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# THE LAW AND PRACTICE

IN  
ACTIONS FOR TORTS

IN THE  
STATE OF NEW YORK

---

PART I  
PRINCIPLES OF LIABILITY

---

PART II  
INJURIES TO THE PERSON

---

By J<sup>r</sup> NEWTON FIERO, LL. D.,

DEAN OF THE ALBANY LAW SCHOOL AND LECTURER ON THE LAW OF TORTS  
AUTHOR OF SPECIAL ACTIONS AND SPECIAL PROCEEDINGS.

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ALBANY, N. Y.  
MATTHEW BENDER  
1903

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## PREFACE.

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I HAVE attempted to prepare a work which shall combine the theory of the Law of Wrongs and the practice in Actions for Injuries to the Person, in such a manner as shall be useful to the practicing lawyer, basing my views of usefulness and convenience very largely upon my own experience; following, however, in the main the classification adopted by the leading text-writers upon the subject.

Like the Special Actions and Special Proceedings, this book has grown out of the collating of authorities for use in my own practice, followed in this instance by an analytical arrangement of the decisions. This collation and analysis of authorities is now extended so as to embrace the general principles governing the Law of Torts, and the rules and practice in actions growing out of Wrongs to the Person.

No attempt is made in this volume to consider the other important divisions of the Law of Torts, as classified at page 13, viz.: "Wrongs to Property," "Wrongs to Both Persons and Property," and the class termed "Miscellaneous Wrongs."

This work is, however, intended to be complete as to the divisions of the subject treated, and while it has been deemed alike unnecessary and impossible to cite all the New York cases in Part I, which is devoted to the general principles of torts, the treatment of the subject covers both the Substantive Law and the methods of procedure under the Code, in each action involving an injury to the person. That is to say, both the law and the practice are given as held in and followed by the authorities, tracing the progress of the action from its commencement to its close. In very many instances rules of law and practice, with the decisions by which they are established, have been intentionally repeated under several different topics or subdivisions of the same topic, when this course was deemed most likely to subserve the convenience of the practitioner, the purpose being to furnish a practical, rather than a purely scientific and theoretical, treatise.

Authorities are cited in every instance, and I have refrained from venturing upon the expression of my own views on controverted or undecided questions. I must take the occasion to express my high appreciation of the kindly manner in which my works on Procedure have been received by the Bar.

J. NEWTON FIERO.

*Gm.*  
ALBANY, September 1, 1903.



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# THE LAW OF TORTS.

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## PART I.

### PRINCIPLES OF LIABILITY.

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#### CHAPTER I.

##### INTRODUCTORY.

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##### ARTICLE I.

###### AUTHORITIES.

While this volume is devoted to a statement of the law and practice in actions for tort in New York, it would be manifestly incomplete without referring the practitioner to such sources as will enable him to pursue, if so disposed, the historical study of the subject, and by reference to elementary works to follow in the reported decisions of other jurisdictions, the modifications of, and exceptions to, the general principles as they have been applied in the courts of this State. Unusually full citations are given from text-writers, and an effort has been made in all cases to give the authority, both as a means of enabling ready reference to the work for fuller examination, and in justice to the author of the treatises cited. Reference is also made in very many instances to the English reports and those of other States and to Federal decisions, more especially those of the Supreme Court of the United States.

It is said by one of the later and best equipped of text-writers that the earliest text-book he is able to find upon the subject is "A meager and unthinking digest of the law of actions for torts and wrongs, published in 1720," a work which the same writer characterizes as remarkable chiefly for the depth of historical

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ignorance which it occasionally reveals. This statement is made in connection with the suggestion that a complete theory of torts has not yet been found, the reason given being, that the subject is a modern one comparatively, so far as any scientific consideration of the topic is concerned.

Still another writer, referring to the earlier work, expresses the view, "This book should be passed over as though it did not exist."

Hilliard on Torts, published in 1859, was the first American work upon the subject and was followed by the standard English work of Addison in 1860. The latter work has passed through several editions and has been annotated by American editors from time to time, including Wood, and Dudley and Baylies.

In 1881 Nathaniel C. Moak, with the efficient assistance of John T. Cook, annotated the English work of Underhill, entitled "Principles of the Law of Torts, or Wrongs Independent of Contract," the author giving rules and sub-rules containing the general principles of the law of Torts, sustained by English authorities, to which the American editors added numerous American decisions. The author published in England in 1900 a thoroughly revised edition under the title "The Law of Torts."

Cooley on Torts, first published in 1878, second edition 1888, continues to be a standard work on the subject, an epitome of which is contained in his later work, "The Elements of Torts," prepared primarily for the use of students at law and instructors in law schools. Of this work the author says the design has been to present succinctly elements of the law of torts, and he further states that liberal use has been made of the text of the larger work upon the subject.

Ray on "Imposed Duties" treats of the same subject in several volumes, largely devoted to the law of negligence, and liability of common carriers.

Bishop in 1889 published "Commentaries on the Non-Contract Law, and especially as to common affairs not of Contract, or the every-day Rights and Torts," Mr. Bishop preferring that title because, as he says, under section 6, the title approaches as nearly to defining with certainty the bounds which the author has assigned for his subject as he has been able to make it.

As a scientific contribution to the subject, Bigelow on Torts is a leading authority. Also Holmes on the Common Law, so far as it treats of Torts, mainly from a historical point of view.

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Pollock on Torts is a scholarly work, and several American editions have been issued with notes; among others, that of Webb in 1894. Sir Frederick Pollock treats the subject to some extent historically, to a very great extent scientifically, and does not omit to give a practical view of the law on the subject. His work, however, like that of Jaggard and the admirable treatise of Hale on the same subject, is especially intended for and adapted to the wants of students at law rather than as a text-book for the practicing lawyer.

To this number should be added "A Brief Summary of Torts," by Professor Erwin, which is precisely what its name implies, and serves an admirable purpose as an introduction to the study of the subject.

Fraser on the Law of Torts, first published in 1888, went through a new edition in 1902. Ringwood on the Law of Torts (3d ed., 1898) is a hand-book, the author of which was lecturer to the Council of the Incorporated Law Society.

All of these have been drawn upon to a greater or less extent and are referred to for what is in many cases a fuller discussion of the subject as to the elementary principles of the Law of Torts. The American and English Encyclopedia of Law is very frequently cited; reference to its pages will be found useful for full citation of authorities from other jurisdictions. The Cyclopedia of Law and Procedure is cited so far as it has treated the topic up to this time.

Elementary works treating of specific branches of the subject will be referred to and commented upon under the appropriate heads, and as scarcely any topic of importance which may be classed under the general head of torts is without one or more text-books, it will be found that the literature of the subject is very extensive, more especially in connection with the Law of Negligence.

**ARTICLE II.****DEFINITIONS.**

Every writer upon the subject of torts has undertaken to give a definition, and in this respect has been followed by very many judges, who, in the course of their opinions, have undertaken to define what is meant by the term "Tort." Moak's Underhill (p. 9), after citing the statement from *Chapman v. Pickersgill*,



## Art. 2. Definitions.

2 Wils. 146, that "Torts are infinitely various, for there is not anything in nature that may not be converted into an instrument of mischief," makes the comment that it is hopeless to attempt a definition of what constitutes a wrongful act upon which an action for tort may be founded:

Cooley (p. 2) defines a tort to be: "Any wrong not consisting in mere breach of contract, for which the law undertakes to give to the injured party some appropriate remedy against the wrongdoer."

Pollock, after stating (p. 2), that a "Tort is nothing but the French equivalent of our English word 'wrong,'" gives the definition (p. 4), "Tort is an action or omission, giving rise, in virtue of the common-law jurisdiction of the court, to a civil remedy which is not an action of contract."

A tort is a breach of some duty between citizens defined by the general law which creates a civil cause of action. *Encyclopedia of the Laws of England*, vol. 12, p. 189, Art. Torts, by Sir Frederick Pollock.

The same author says that the modern law of torts may be considered as enforcing so much of the moral duty "to hurt nobody by word or deed" as positive law can conveniently enforce in the present state of society.

Bishop cites Co. Lit. 158, that "Tort" means nearly the same thing as the expression "civil wrong." He says further (§ 4): "A tort is one's disturbance of another in rights which the law has created, either in the absence of contract, or in consequence of the relation which a contract has established between the parties. Of course the wrong must be one which the law redresses, not a mere infraction of good morals."

Hale on Torts (p. 4) calls attention to and criticises the definition suggested in Clerk & Lindley on Torts, 1, "A tort is a wrong independent of a contract for which the appropriate remedy is a common-law action," thus differentiating that class of civil wrongs which can only be remedied in a divorce, ecclesiastical, or probate court, or in courts of equity. Pollock's definition, heretofore given, also calls attention to the common-law jurisdiction.

Hale (p. 5) cites from 91 Ky. 121, what he regards as a very simple but in many respects admirable definition as follows: "A tort is a breach of duty fixed by municipal law, for which a suit for damages may be maintained." This is very like the simplest

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and, upon the whole, most complete definition given in a recent legal periodical, defining torts, "as a certain class of wrongs for which there is a legal remedy in a common-law court." This, perhaps, is rather a characterization than a definition, but seems upon the whole the clearest and most concise statement, aside from the fact that it excludes the idea of a wrong cognizable in a court of equity, and thereby narrows the term much beyond what is justifiable under modern practice, since the jurisdiction of equity to prevent an intended wrong, or to relieve from the consequences of a tortious act, is firmly fixed and freely exercised.

It must be noted that torts under our system are largely subject to the equitable jurisdiction of the court, as in cases of actions for relief from fraud, or by way of injunction to prevent wrongful acts. See chap. VI, "Remedies."

The failure of definitions to define is aptly stated in Bigelow on Torts, as follows:

"To attempt a definition which would tell its own story on its face would be hopeless. Indeed no definition, helped out however much by explanation, can convey an adequate notion of the meaning of the word; nothing short of careful study of the specific torts of the law will answer, for there is no such thing as a typical tort, an actual tort, that is to say, which contains all the elements entering into the rest. One tort is as perfect as another; and each tort differs from the others in its legal constituents. The definitions all have this in common, that there must be a breach of duty paramount, or, as we shall now put it, established by municipal law; and they all lead to an action for damages. These facts must furnish our definition. Accordingly a tort may be said to be *a breach of duty established by municipal law for which a suit for damages can be maintained*; or, conversely, *the infringement of a private right, or a public as a private right, established by municipal law.*" Bigelow, 29.

The English Common Law Procedure Act of 1852 defines a tort as a wrong independent of contract. This definition does not, however, seem to be entirely satisfactory, since, as Cooley remarks (p. 104), "In many cases an action as for a tort or an action as for a breach of contract may be brought by the same party on the same state of facts." He explains this by the illustration of a false warranty to accomplish a sale of property, the purchaser having his remedy upon the contract of warranty, or in an action for a tort,

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for having induced the purchase by fraud. He says there is a broken contract, which would afford a remedy for the purchaser, but there is also deception, to the injury of the purchaser in procuring the contract to be made. The suit may be brought on contract ignoring fraud, or it may be brought for the fraud not counting upon the contract, though the contract will necessarily be shown in order to make appear how the deception was injurious. "The tort in such a case is connected with the contract only as it enabled the tortfeasor to bring the party wronged into it."

In such cases the tort is dependent upon, while at the same time independent of, the contract; for if the latter imposes a legal duty upon a person, the neglect of that duty may constitute a tort founded upon a contract. 1 Addison on Torts, 17.

Judge Finch, in *Rich v. N. Y. C. & H. R. R. Co.*, 87 N. Y. 382 (390), says: "We have been unable to find any accurate and perfect definition of a tort. Between actions plainly *ex contractu* and those as clearly *ex delicto* there exists what has been termed a border land, where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other, and become so nearly coincident as to make their practical separation somewhat difficult. (Moak's Underhill on Torts, 23.) The text-writers either avoid a definition entirely (Addison on Torts), or frame one plainly imperfect (2 Bouvier's Law Dict. 600), or depend upon one which they concede to be inaccurate, but hold sufficient for judicial purposes. (Cooley on Torts, 3, note 1; Moak's Underhill; 1 Hilliard on Torts, 1.) By these last authors a tort is described in general as "a wrong independent of contract."

Such actions were primarily divided into two classes, distinguished as actions *ex contractu* and *ex delicto*. The actions known as detinue, trespass, trespass on the case, and replevin were those used in causes of action arising from torts, and were described as actions *ex delicto*. Trespass on the case was the appropriate form of remedy for all injuries to persons or property which did not fall within the compass of the other forms of action. *Hegerich v. Keddie*, 99 N. Y. 258.

Every one is under obligation: (1) To abstain from willful injury; (2) To respect property rights; (3) To act with reasonable and proper care. Erwin Summary of Torts, 19.

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Art. 2. Definitions.

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Bishop says (§ 19): "The foundation of common-law principles are, in substance, that every man is free to be active, pursuing his own interests and happiness, and using his own property as he will, without being answerable for casual and unmeant injuries resulting to others; provided, that he does not, even unintentionally, deal with another's property as his own, that neither purposely nor carelessly does he so use his own as unnecessarily to prejudice another, and that neither negligently nor especially from an evil motive does he harm another in person or reputation, in a manner and degree within the law's cognizance. Thus qualified, for all wrongs done to others with injurious intent, even for all which proceed from indifference whether harm is done or not, and for all evil consequences to others which result from the doer's want of care in conducting his own affairs, he is answerable to the sufferer. In the nature of things, these general principles are not alone adequate guides for all possible cases; but they enable us the more intelligently to trace the minuter lines which judicial decision has drawn, and to determine the true law where the adjudications differ or otherwise there is doubt."

The business of the law of torts is to fix the dividing lines between those cases in which a man is liable for harm which he has done, and those in which he is not. But it cannot enable him to predict with certainty whether a given act under given circumstances will make him liable, because an act will rarely have that effect unless followed by damage, and for the most part, if not always, the consequences of an act are not known, but only guessed at as more or less probable. All the rules that the law can lay down beforehand are rules for determining the conduct which will be followed by liability if it is followed by harm,—that is, the conduct which a man pursues at his peril. The only guide for the future to be drawn from a decision against a defendant in an action of tort is that similar acts under circumstances which cannot be distinguished except by the result from those of the defendant, are done at the peril of the actor; that if he escapes liability, it is simply because by good fortune no harm comes of his conduct in the particular event. Holmes, 79.

It may be granted that an omission to perform a contract obligation is never a tort unless that omission is also an omission of a legal duty. But such legal duty may arise not merely out of

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 Art. 2. Definitions.
 

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certain relations of trust and confidence, inherent in the nature of the contract itself, but may spring from extraneous circumstances, not constituting elements of the contract as such, although connected with and dependent upon it, and born of that wider range of legal duty which is due from every man to his fellow, to respect his rights of property and person, and refrain from invading them by force or fraud. It has been well said that the liability to make reparation for an injury rests, not upon the consideration of any reciprocal obligation, but upon an original moral duty enjoined upon every person so to conduct himself, or exercise his own rights as not to injure another.

Whatever its origin, such legal duty is uniformly recognized, and has been constantly applied as the foundation of actions for wrongs; and it rests upon and grows out of the relations which men bear to each other in the framework of organized society.

\* \* \* The whole doctrine is accurately and concisely stated in 1 Chit. Pl. 135, that "if a common-law duty results from the facts, the party may be sued in tort for any negligence or misfeasance in the execution of the contract." *Rich v. N. Y. C. & H. R. R. Co.*, 87 N. Y. 382, at 398-399.

Underhill regards the tortious element as consisting in the doing of an act not authorized by law, or the doing of something which one ought not to do under the law; where such act or omission infringes a right, or interferes with the enjoyment to which another is entitled, or causes such other some substantial loss of money, health, or material comfort beyond that suffered by the rest of the public.

Moak's Underhill (p. 10) lays down as a rule that a man is guilty of a tort who, without authority or excuse, either:

"(a) Wittingly or unwittingly does any act, or makes any written or verbal statement, which infringes upon any absolute right of another person.

"(b) Wittingly or unwittingly does any act which is forbidden by law.

"(c) Omits to do something which a reasonable man would do, or does something which a reasonable man would not do.

"(d) Makes any false statement, either written or verbal, to another, with intent to deceive.

"(e) Omits to make any statement with intent to deceive in cases in which there is a legal duty upon him to make such statement."

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Art. 2. Definitions.

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At page 20, Pollock states his views as to what constitutes a tort. He says: "Tort is an act or omission (not merely the breach of a duty arising out of a personal relation, or undertaken by contract) which is related to harm suffered by a determinate person in one of the following ways:

"(a) It may be an act which, without lawful justification or excuse, is intended by the agent to cause harm, and does cause the harm complained of.

"(b) It may be an act in itself contrary to law, or an omission of specific legal duty, which causes harm not intended by the person so acting or omitting.

"(c) It may be an act or omission causing harm which the person so acting or omitting did not intend to cause, but might and should, with due diligence, have foreseen and prevented.

"(d) It may, in special cases, consist merely in not avoiding or preventing harm which the party was bound, absolutely or within limits, to avoid or prevent."

Bigelow says (§§ 25, 28, 52, 7th ed.), the various kinds of duty involved in the different torts are capable of being grouped into three classes upon a helpful basis. The three classes may be put thus:

1. Lawful acts done by wrongful means.
2. Unlawful acts.
3. Events caused by negligence.

As to the first class, it matters not what means may be employed so long as they are wrongful; as to the second class, it is unimportant as to the means employed so far as the right of action is concerned; as to the third class, it consists in a breach of duty through negligence.

An act or omission may be wrong in morals, or it may be wrong in law. It is scarcely necessary to say that the two things are not interchangeable. No government has undertaken to give redress whenever an act was found to be wrong, judged by the standard of strict morality; nor is it likely that any government ever will. Cooley, 3.

The ways in which one may become liable to an action as for tort are the following:

1. By actually doing to the prejudice of another something he ought not to do.

2. By doing something he may rightfully do, but wrongfully or negligently doing it by such means or at such time or in such manner that another is injured.

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 Art. 3. Classification.
 

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3. By neglecting to do something which he ought to do, whereby another suffers an injury. Cooley, 64.

Actions for torts will lie in several different classes of cases, such, for instance, as for an injury to the person or to personal rights; for the wrongful taking or conversion of personal property; for an injury to personal or real property, and the like cases. The right of action for a tort is generally founded, either upon an invasion of some legal right of person or property, or on the violation of some duty toward the public which has resulted in some damage to the plaintiff, or on the infraction of some private duty or obligation which has been productive of damage to the complaining party. 1 Wait's Actions and Defenses, 132.

Chief Judge Parker in *City Trust Co. v. American Brewing Co.*, 174 N. Y. 486 (488), quotes the maxim of Justinian that "The maxims of law are these: to live honestly, to hurt no man, and to give every one his due," saying that ever since that time it has been a leading object of jurisprudence to compel wrongdoers to make reparation, and that it is a general rule of law that a person commits a tort and renders himself liable for damages who does some act forbidden by law, if that act causes another substantial loss beyond that suffered by the rest of the public.

### ARTICLE III.

#### CLASSIFICATION.

Sir Frederick Pollock has attempted to reduce the Law of Torts to certain general principles, and prescribes a threefold division. He says: "There are wrongs affecting a man in the safety and freedom of his own person, in honor and reputation, or in his estate, condition, and convenience of life generally; the word *estate* being here understood in its widest sense, as when we speak of those who are 'afflicted or distressed in mind, body, or estate.' There are other wrongs which affect specific property, or specific rights in the nature of property; property, again, being taken in so large a sense as to cover possessory rights of every kind. There are yet others which may affect, as the case happens, person or property, either or both." And proceeds to group these wrongs under the heads respectively of "personal wrongs," "wrongs to property," "wrongs to personal estate and property generally," and comments that, generally speaking, the wrong in

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Art. 3. Classification.

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the first group is willful or wanton; in the second, that the element of willfulness or wantonness is at first sight absent, or at any rate indifferent; while in the third, the acts or omissions constituting the wrong have a kind of intermediate character.

Hale (p. 54 *et seq.*) classifies liability as follows: (1) Where conduct was willful or malicious. (2) Where the conduct was negligent. (3) Where it was done at peril.

It has been said that every action for a pure tort involves the questions, first, whether the plaintiff has the legal right claimed and whether the same has been invaded. Second, whether the act of the defendant was within his own legal rights. Third, whether the act was such as to be privileged, then whether the case in hand marks an instance falling within such privilege. Krauthoff on Malice in Civil Actions, American Bar Association, report 1898, p. 335, reviewing *Allen v. Flood*, App. Cas. 1, 1898.

Bigelow classifies the Law of Torts under (I) General theory and doctrine. (II) Lawful acts done by wrongful means or of malice. (III) Unlawful acts, breach of absolute duty. (IV) Events caused by negligence.

Cooley, p. 23, says, that the rights which every government is expected to recognize and protect may be classified under the following heads: (1) Security in person. (2) Security in the acquisition and enjoyment of property. (3) Security in the family relations.

This appears to be only another method of classifying the wrongs to person and property.

In 26 Am. & Eng. Encyc. of Law, 76, Torts are classified, not as to the theory of wrongs, but with reference to the manner of treatment and from a practical standpoint:

I. Wrongs affecting personal safety and security, which are subdivided into (1) assault and battery; (2) false imprisonment; (3) malicious prosecution.

II. Libel and slander.

III. Deceit, including fraud, fraudulent sales, misrepresentation, and the like.

IV. Wrongs affecting domestic relations, subdivided into (1) of husband and wife; (2) of parent and child; (3) of guardian and ward; (4) of master and servant.

V. Injuries to real property, and including thereunder trespass, party walls, waste, etc.



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VI. Injuries to personal property, including conversion, replevin, trover, trespass, bailment, and the like.

VII. Wrongs affecting easement, such as obstructions to private ways, highways, navigable waters, etc.

VIII. Infringement of copyrights, patents, and trademarks.

IX. Violation of water rights, including the treatment of waters and water-courses, underground waters, navigable waters.

X. Damage by animals.

XI. Escape of dangerous substances.

XII. Nuisances, both private and public.

XIII. Negligence.

It will be noted that this enumeration does not include all actionable wrongs. The most notable omissions from the list is the unlawful interference with personal and property rights, growing out of the relation of employer and employee, and questions arising from unlawful combinations of capital, which have come to form a very important part of the modern law of torts.

The abolition of forms of action by the Code has not in any wise affected the names of specific actions which are necessarily retained to indicate the character of the *right of action*, but no longer to indicate that such an action must be prosecuted in a particular *form*. Judge Holmes says (p. 82), "The abolition of the common-law forms of pleading has not changed the rules of the substantive law. Hence, although pleaders now generally allege intent or negligence, anything which would fairly have been sufficient to charge the defendant, is still sufficient notwithstanding that the ancient form of action has passed away."

A single action has, under the Reformed Procedure, been substituted for the numerous actions at common law, but the right to recover exists as before. We recover now for a wrongful taking, and say we recover *for* a conversion, not *in an action for* conversion, and in some instances specific provisions still give a name to the action as in replevin, but as a rule we now speak of the cause of action as for trespass or negligence, without reference to its form, which is, except in the case of the so-called special actions, the same in all cases; and in these the action is brought and conducted in the same manner except as necessarily modified in its details to meet special conditions.

This statement is made so that it may be understood at the outset that the divisions of this work are based not upon any differ-

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Art. 3. Classification.

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ence in forms of remedy, as would have been indicated under the old practice, but are based upon convenience in reference to the subject-matter of the action, which is still necessarily designated so largely by the common-law terms which before the Code described both the subject-matter and the form of action.

A practical classification of Torts may be made with a view to bringing together related topics, rather than for the purpose of scientific classification, but it is believed that to a very large extent both the practical and theoretical view of the Law of Torts may be satisfied in a classification which is in a measure based upon that of Sir Frederick Pollock, although intended to meet the wants of the practitioner rather than the student and therefore intended to be severely practical rather than strictly scientific.

I. The general principles of Torts are necessarily treated apart from specific wrongs. II. Purely personal wrongs seem to follow naturally as next in importance. III. Wrongs to property only, as distinguished from those which are injurious to the person. IV. A very important class of wrongs, viz.: Negligence and Nuisance may be injuries to either person or property, or to both. V. There still remain certain wrongs, some of them being in the class of "unnamed wrongs" not readily classified, although necessarily injurious to person or estate or both, and they may be considered as miscellaneous wrongs. Only the first two of these divisions of the subject will be considered in this volume.

Classification of Torts as injuries to the person "and injury to property" seems justified by the definitions of these phrases, section 3343, subds. 9 and 10, as follows: "Subd. 9. A personal injury includes libel, slander, criminal conversion, seduction, and malicious prosecution; also, assault and battery, false imprisonment, or other actionable injury to the person, either of the plaintiff or of another."

"Subd. 10. Injury to the property is an actionable act, whereby the estate of another is lessened, other than a personal injury, or the breach of a contract."

## CHAPTER II.

### PERSONAL AND PROPERTY RIGHTS.

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#### ARTICLE I.

##### CIVIL RIGHTS.

A brief consideration of the question as to what constitutes personal and property rights is desirable in view of the fact that a tort is committed only when a legal, as distinguished from a moral right, is violated; and a legal right is said to be violated only when one is damaged in respect to his person, his property, or his reputation. Hale, 50.

The abstract question of "rights" both as to safety of persons and protection of property is very fully considered in Holland's *Elements of Jurisprudence*, treating of law and rights. The nature and character of a legal right is also considered, Holmes' *Common Law*, 214, 219, 239; and the domain of tort in connection with legal rights is very fully discussed, Bigelow on Torts, 1-8.

A right is a measure of control delegated by the supreme political authority of a State to persons said to be thereby invested with the right over the acts of other persons said to be thereby made liable to the performance of a duty. Sheldon Amos' *Science of Law*, 97.

Cooley, in his *Treatise on Torts*, pp. 23-46, treats this subject very fully under the title "General Classification of Legal Rights," defining a right as implying something with which the law invests one person, and in respect to which for his benefit another or perhaps all others are required by the law to do or to perform acts or to forbear or abstain from acts. Citing Austin's *Jurisprudence*, Lectures VI and XVI.

Judge Cooley then defines personal rights as including "the right to live, the right to immunity from attacks and injuries, and

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the right equally with others similarly circumstanced to control one's own action."

Civil rights he sums up as "the right to exemption from any restraint that has in view no beneficial purpose, and the right to participate in all the advantages of organized society."

Civil rights are defined to be those rights which appertain to a person by virtue of his citizenship in a State or community. Among those rights, as enumerated (6 Am. & Eng. Encyc. of Law, 72 *et seq.*) are that the citizens of each State, when in another State, are entitled to all the privileges and immunities of the citizens of the latter, as such. The right to acquire State citizenship in any State by residence therein. The right to any person within the jurisdiction of the State of equal protection of its laws. On the other hand, it is said the right to vote is not a civil but a political right.

Political rights are defined to consist in the power to participate directly or indirectly in the establishment or management of the government. 22 Am. & Eng. Encyc. of Law, 942.

Abbott's Encyclopedic Digest, under title Civil Rights, includes the consideration of protection of rights of persons from class or racial discrimination. Citing *People v. King*, 42 Hun, 186; *affd.*, 110 N. Y. 418, to the point that a conviction for refusing to sell colored persons tickets for admission to a skating-rink should be sustained. *Miller v. N. J. Steamboat Co.*, 58 Hun, 424, 12 N. Y. Supp. 301; *affd.*, 135 N. Y. 612, where plaintiff, a colored man, was refused a state room in exchange for berths which he had bought for himself and family on the steamboat. *People ex rel. King v. Gallagher*, 11 Abb. N. C. 187; *affd.*, 93 N. Y. 438, that the Civil Rights Bill (Laws 1873, chap. 186), does not take away the right, when otherwise conferred by statute, to maintain separate common schools for colored children, nor entitle a colored child to admission to a school for white children, where it does not appear that those provided for colored children are not as good in every respect.

Pollock (p. 174) states the doctrine to be that the exercise of ordinary rights for a lawful purpose and in a lawful manner is no wrong even if it causes damage. The rule is recognized and commented upon in *Losee v. Buchanan*, 51 N. Y. 484.

The right not to be harmed takes at common law the form of a command not to injure another in respect to his person, property, or reputation. Hale, 51, citing Piggard on Torts, 10.

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Certain rights of person and property are protected by both the Federal and State Constitutions. The amendments to the Federal Constitution, known as the Bill of Rights, follow article VII of the Constitution as originally adopted, and provide, among other things, that no law shall be passed interfering with religious liberty or abridging the freedom of speech or press; the right of the people to assemble and petition; protecting the people against unreasonable searches and seizures; prohibiting excess of bail, etc.

Article I of the State Constitution prohibits disfranchising of any citizen unless by the law of the land or the judgment of his peers; prescribes that trial by jury shall remain inviolate forever; provides for the free exercise and enjoyment of religious liberty, and prohibits the suspension of habeas corpus and infliction of excessive fines; also protects the freedom of the press, right to assemble and petition, etc., and provides that private property shall not be taken without due process of law.

There are certain natural rights enforced in the Constitution by prohibitions against interference with them; such as the right to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice; to due process of law, and to an equal protection of the law; to immunity from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. *Downs v. Bidwell*, 182 U. S. 244 (282).

The following propositions are firmly established and recognized: A person living under our Constitution has the right to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit. The term "liberty," as used in the Constitution, is not dwarfed into mere freedom from physical restraint of the person of the citizen as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Liberty, in its broad sense, as understood in this country, means not only the right of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his liveli-

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hood in any lawful calling, and to pursue any lawful trade or avocation. *People v. Gillson*, 109 N. Y. 389 (398), citing *Slaughter-House Cases*, 16 Wall. 36 (106); *Matter of Jacobs*, 98 N. Y. 98; *Bertholf v. O'Reilly*, 74 N. Y. 509; *People v. Marx*, 99 N. Y. 377.

While the police power of the State is so broad that no court has sought to define accurately its extent, still it is subject to recognized limitations. In the interest of public health, of public morals, and of public order, a State may restrain and forbid what would otherwise be the right of a private citizen. It may enact laws to regulate the extent of the labor which women and children, or persons of immature years shall be allowed to perform and prohibit altogether their employment in dangerous occupations. It may limit the hours of employment of adults in unhealthy work, but while it is generally for the legislature to determine what laws and regulations are needed to protect the public health and serve the public comfort and safety, such measures must have some relation to these ends. *People v. Orange County Road Construction Co.*, 175 N. Y. 84.

A consideration of the authorities interpreting and construing these provisions of the Constitution belongs to the domain of constitutional law. Attention is called to the subject here for the reason that any interference with the rights guaranteed by the Federal or State Constitution is a wrongful act, which may, in a proper case, be prevented by a court of equity, or for which damages as for a wrong may be recovered in a court of law. Some of the more important authorities relating to interference with civil and political rights are cited rather by way of illustration, and as indicating a remedy to be pursued, than with a view to any exhaustive treatment of the subject.

## ARTICLE II.

### PRIVILEGES AND IMMUNITIES OF CITIZENS.

It is provided by section 2, article 4 of the Federal Constitution, that "citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."

In *Slaughter-House Cases*, 16 Wall. 36 (75), Miller, J., cites with approval from *Corfield v. Coryell*, 4 Wash. C. C. 371, which he characterizes as the leading case on the subject, as fol-

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lows: "The inquiry is, 'What are the privileges and immunities of citizens of the several States?' We feel no hesitation in confining these expressions to those privileges and immunities which are *fundamental*; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: Protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."

Justice Miller further cites *Ward v. State of Maryland*, 12 Wall. 430, and *Paul v. Virginia*, 8 Wall. 180.

In *McCready v. Virginia*, 94 U. S. 391, Chief Justice Waite again cites *Corfield v. Coryell*, together with *Scott v. Sanford*, 19 How. 580, in which the privileges and immunities of the citizen, as referred to in the Constitution, are described to be such "as belonged to general citizenship;" but adds that usually the courts have manifested the disposition which the Supreme Court did, in *Connor v. Elliott*, 18 How. 593, not to attempt to define the words, but rather to leave their meaning to be determined in each case upon a view of the particular rights asserted, reviewed, or denied therein.

This is followed by a holding that this provision of the Constitution does not vest the citizens of one State with any interest in the common property of the citizens of another State. And in *Kimmish v. Ball*, 129 U. S. 217, it is held that this clause of the Constitution does not give nonresident citizens of a State any greater privileges and immunities in that State than her own citizens enjoy.

In *Warner v. Jaffray*, 30 Hun, 326 (330), it is said that a holding which will secure to the judicial proceedings of one State in all the others the same uniform validity and authority which they may have acquired under the laws of the State in which they are pending, will be in accordance with the provisions of sections 1 and 2 of article 4 of the Federal Constitution.

The distinction made between residents and nonresidents by

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section 1780 of the Code is not repugnant to this provision of the Federal Constitution. *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315. But corporations are not citizens within the meaning of the clause in the Constitution declaring that the citizens of each State shall be entitled to all privileges and immunities of citizens of several States. *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181.

**ARTICLE III.****DUE PROCESS OF LAW.**

It is provided by article 5, amendments to the Federal Constitution, that no person shall be deprived of life, liberty, or property without due process of law. Article 1, section 1 of the State Constitution provides that no member of the State shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers."

It is said in *People ex rel. Witherbee v. Supervisors*, 70 N. Y. 228 (234), opinion Folger, J., that the meaning of the words "the law of the land" is not materially different in meaning from the phrase "due process of law." In the same opinion it is said that "due process of law requires that a party shall be properly brought into court, and that he shall have an opportunity when there to prove any fact which, according to the Constitution and the usages of the common law, would be a protection to him or his property."

In *Happy v. Mosher*, 48 N. Y. 313, it is held that this provision does not require a legal proceeding according to the course of the common law, nor must there be personal notice to the party whose property is in question. It is sufficient if a kind of notice is provided by which it is reasonably probable that the party proceeded against will be apprised of what is going on and an opportunity offered to him to defend. The opportunity to defend must not be colorable and illusory, but it matters not, though it may be difficult, so long as it is not impracticable.

In *Ward v. Boyce*, 152 N. Y. 191 (195), the court holds, per O'Brien, J., "A party cannot be deprived of property without due process of law, and that term, in its application to judicial proceedings, means a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights. If the



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proceedings involve the determination of the personal liability of the defendant, he must be brought within the jurisdiction by service of process within the State, or voluntary appearance. If it be a proceeding *in rem* the *res* must have been seized or attached, or at least must be within the jurisdiction." Citing numerous authorities from this State and in the Federal courts.

The words "due process of law" means a course "of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its Constitution — that is, by the law of its creation — to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance." *Pennoyer v. Neff*, 95 U. S. 714 (733), cited and followed in *Scott v. McNeal*, 154 U. S. 34 (46).

Legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters; that is, by process or proceedings adapted to the nature of the case. *Dent v. West Virginia*, 129 U. S. 114, distinguishing *Cummings v. Missouri*, 4 Wall. 277, and *Ex parte Garland*, 4 Wall. 333.

A very complete monograph on this point will be found in address by Chief Judge Parker before the Georgia Bar Association, July, 1903, on "Due Process of Law."

## ARTICLE IV.

### POLITICAL RIGHTS.

"Political rights" Judge Cooley defines as "the privilege of participation in the government which is conferred as an act of sovereignty on those whose participation is supposed to be most beneficial to the State."

Political rights are said to be distinguished from civil rights. It is said that the right of suffrage was not necessarily one of the privileges or immunities of citizenship before the adoption of the Fourteenth Amendment, and that amendment does not add to these privileges and immunities.

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At the time of the adoption of the amendment suffrage was not coextensive with the citizenship of the State, nor was it at the time of the adoption of the Constitution. Neither the Constitution nor the Fourteenth Amendment made all citizens voters, and the provision of the State Constitution which confines the right of voting to *male* citizens of the United States, is no violation of the Federal Constitution. *Minor v. Happersett*, 21 Wall. 162.

The right of suffrage may be termed an artificial or remedial right and is not of the same character as certain natural rights. *Downes v. Bidwell*, 182 U. S. 244 (282).

The privilege of participation in the government is conferred as an act of sovereignty on those whose participation is supposed to be most beneficial to the State. Being a privilege no one is supposed to be injured when it is not conferred upon him. Some political privileges are the right of every person, whether an elector or not. Such is the privilege of meeting and discussing public affairs with others. Such also are the privileges of petition and remonstrance. Cooley on Torts, 37. See also Cooley's Const. Lim., § 589.

Cooley (at p. 33) sums up the whole body of civil rights as the right to exemption from any restraint that has in view no beneficial purpose and the right to participate in all the advantages of organized society.

In *Ashby v. White*, Ld. Raym. 938, 1 Salk. 19, the returning officer who refused to admit a qualified elector to vote was held liable in damages at his suit. This case was followed in *Lincoln v. Hapgood*, 11 Mass. 350, although qualified by later English cases.

In *People v. Pease*, 27 N. Y. 45, it was held that the inspectors of election are not judicial or administrative officers; that their decision is final only as to receiving or rejecting votes; but the question whether a voter was or was not entitled to vote is open to examination in subsequent proceedings upon any competent evidence; and that inspectors have no authority to reject a vote except in the special cases where such authority is expressly given by statute.

In *Goetchens v. Matthewson*, 61 N. Y. 420, an action was brought alleging that inspectors, intending to deprive the lawful voter of his rights as a citizen, refused to permit him to vote at

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an election. The inspectors denied that they rejected the vote maliciously, and claimed that their duties were judicial in their nature, and that they were not liable to a civil action for an error in judgment. The court held in opinions by Lott, Ch. C., and Dwight, C., the latter writing a very elaborate opinion, citing a large number of authorities, that the inspectors were liable to an action for the damages resulting from their refusal to accept the vote tendered by plaintiff.

In *People ex rel. Stapleton v. Bell*, 119 N. Y. 175, the rule was reiterated that inspectors of election are simply ministerial officers, and the board of inspectors has no discretionary powers to reject the vote of a person who, upon being challenged and upon application of the statutory test, has shown himself qualified to vote.

Upon the authority of the cases above cited it was said in *People ex rel. Sherwood v. Board of Canvassers*, 129 N. Y. 360 (372), that when a voter at an election offers his vote to the inspectors, and, being challenged, takes the preliminary oath, and, after answering fully the questions touching his right to vote, offers to take the general oath, it is the absolute duty of the inspectors to receive his vote.

## ARTICLE V.

### RELIGIOUS LIBERTY.

By article 1 to the amendments to the Constitution of the United States, it is provided that Congress shall make no law respecting an establishment of religion or prohibiting a free exercise thereof.

By article 6, section 3 of the Federal Constitution it is provided that no religious test shall ever be required as a qualification to any office or public trust under the United States.

Article 1, section 3 of the State Constitution provides for the exercise and enjoyment of religious liberty. It is provided by that section that the liberty of conscience thereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the State.

It was never intended that the provision of the Constitution that Congress should make no laws respecting the establishment of religion or prohibiting the free exercise thereof, should be a pro-

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tection against legislation for the punishment of acts inimical to the peace, good order, and morals of society. *Davis v. Beason*, 133 U. S. 333.

It is said in the latter case by Mr. Justice Field, opinion p. 345: "It is assumed by counsel of the petitioner, that because no mode of worship can be established or religious tenets enforced in this country, therefore, any form of worship may be followed, and any tenets, however destructive of society, may be held and advocated, if asserted to be a part of the religious doctrines of those advocating and practising them. But nothing is further from the truth. Whilst legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as religious."

At the close of the official report, p. 348, will be found a note calling attention to the provisions of former constitutions of this State relative to freedom of worship.

The legislature has authority to protect the Christian Sabbath from desecration by such laws as it may deem necessary, and it is the sole judge of the acts proper to be prohibited with a view to the public peace on that day. *Neuendorff v. Duryea*, 69 N. Y. 557.

## CHAPTER III.

### ELEMENTS OF AN ACTIONABLE WRONG.

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#### ARTICLE I.

##### A LEGAL RIGHT MUST BE VIOLATED AND DAMAGE ENSUE.

It is not enough that a legal right be violated, but in addition thereto there must follow damage to the party claiming to be aggrieved by such violation. This damage must be either proven by evidence, as is necessary in most cases, or is presumed by law for the protection of a right; hence has arisen much discussion carried on with great learning as to the true theory of recovery, in certain torts where no actual damage is shown to have been suffered by the injured party. A trespass upon land, where the trespasser has done no actual injury, is cited as an illustration of the difficulty surrounding the rule that there can be no recovery, except in case of damage. If, to the proposition that no recovery can be had unless damage is sustained, is added the statement that this damage may be either actual, as proven, or presumed by law, the difficulty will be much less, more particularly if it is borne in mind that recovery can be had in tort in those cases only where it is held that the wrongful act results in damage for which the actor is responsible by operation of positive law holding him to a liability. It is quite true that this does not entirely meet any theory of liability advanced or which can be made of universal application, but Judge Holmes (Common Law, p. 77), aptly and truthfully says on this point, "The law did not begin with a theory. It has never worked one out."

The phrase "*damnum absque injuria*" is defined in Fraser on Torts, p. 3, to mean actual and substantial loss without infringement of any legal right, in which case no action lies. On the

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other hand, *injuria sine damnum* is defined by the same authority to be the infringement of a legal right without any actual loss or damage, and in such case a person whose right is infringed has no cause of action.

Underhill (at pp. 6-7) discusses the meaning and effect of the terms *damnum absque injuria* and *injuria sine damnum*, of which he says: "This jingle has probably puzzled many generations, but it comes to very little when dissected." The author then defines *damnum* as meaning damage in a substantial sense of money, loss of comfort, service, health, or the like. By *injuria* is meant an unauthorized interference, however trivial, with some general right conferred by law on the plaintiff. He adds, that "The maxims come to this, that no action lies for mere damage, however substantial, caused without breach of law; but that an action does lie for interference with another's legal private rights, even where unaccompanied with damage." Hence there must be an unauthorized act or omission causing either infringement of some general right, or inflicting some substantial private damage, and the injury must fall within some class recognized by law, and for which an action for damages is the appropriate remedy.

There is a material distinction between damages and injury. Injury is the wrongful act; damages the indemnity to the person who suffers loss or harm from the injury. The law has always recognized the difference between the things described, holding that no action will lie because the act is *damnum absque injuria*. 8 Encyc. of Law (2d ed.), 544, citing *North Verger v. Voegler*, 103 Ind. 314.

It may be stated as a general proposition that every man has a right to the natural use and enjoyment of his own property, and if while lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*, for the rightful use of one's own property may cause damage to another without any legal wrong. 8 Am. & Eng. Encyc. of Law, 695.

Bishop states (§ 22), that for the law to furnish redress, there must be an act which under the circumstances is wrongful, and it must take effect upon the person, the property, or some other legal interest of the party complaining. Citing *Hutchins v. Hutchins*, 7 Hill, 104. In that case Chief Judge Nelson said (p. 108): "Fraud without damage or damage without fraud, gives no cause of action; but where both concur, an action lies. Dam-

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age, in the sense of the law, may arise out of injuries to the person or to the property of the party; as any wrongful invasion of either is a violation of his legal rights, which it is the object of the law to protect. Thus, for injuries to his health, liberty, and reputation, or to his rights of property, personal or real, the law has furnished the appropriate remedies. The former are violations of the absolute rights of the person, from which damage results as a legal consequence. As to the latter, the party aggrieved must not only establish that the alleged tort or trespass has been committed, but must aver and prove his right or interest in the property or thing affected, before he can be deemed to have sustained damages for which an action will lie."

It is of the very essence of the contract for fraud or deceit that it should be accompanied by damage, and neither *damnum absque injuria* nor *injuria absque damnum* by themselves constitute a good cause of action. *Deobold v. Oppermann*, 111 N. Y. 531 (542).

In *Holland House v. Baird*, 169 N. Y. 136 (140), opinion Gray, J., it is said that wrong and damage must concur to create a cause of action, citing language of Andrews, Ch. J., in *Booth v. R., W. & O. R. R. Co.*, 140 N. Y. 267.

To sustain an action for damages the violation of a legal right must be shown. The mere fact that the complainant has suffered damage is not enough. There must be a violation of the duty recognized by law on the part of the person occasioning the damage. There must be injury as well as damage. *Pasley v. Freeman*, 3 Term R. 51; Hale on Damages, 8; Jaggard on Torts, 87; Mechem's Cases on Damages, 3; *Webb v. Portland Mfg. Co.*, 3 Sumn. 189; *Day v. Brownrigg*, 10 Ch. Div. 294.

Jessel, M. R., in *Day v. Brownrigg*, 10 Ch. Div. 294, says (at p. 304): "You must have in our law injury as well as damage;" and it is said in *Rex v. Commissioners, etc.*, 8 B. & C. 355, that to constitute a tort, two things must concur, actual or legal damage to the plaintiff, and a wrongful act committed by the defendant.

At the foundation of every fraud must lie some violation of a legal duty, and therefore some unlawful act or omission. Cooley on Torts, 60, citing *Rich v. N. Y. C. & H. R. R. Co.*, 87 N. Y. 382 (394).

In *McGuire v. Bloomingdale*, 8 Misc. Rep. 478 (480), 29 N. Y. Supp. 580, the court cites the language of Lord Westbury in *Tip-*

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*ping v. St. Helen's Smelting Co.*, 116 Eng. C. L. 608, "If a man lives in a town, of necessity he must submit himself to the consequences of the operation of trade which may be carried on in his immediate neighborhood, which are actually necessary to trade and commerce, also for the enjoyment of property and for the benefit of the inhabitants of the town. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, and is carried on in a reasonable and fair way, he has no ground for complaint because to himself there may arise much discomfort from the trade carried on in that shop."

In *Mahan v. Brown*, 13 Wend. 262 (265), Savage, Ch. J., says: "The defendant has not so used his own property as to injure another. No one, legally speaking, is injured or damnified unless some right is infringed. The refusal or discontinuance of a favor gives no cause of action. The plaintiff in this case has only been refused the use of that which did not belong to her; and whether the motives of the defendant were good or bad, she has no legal cause of complaint."

Loss or damage to one person, arising from the use made by another of his own property, is *damnum absque injuria*, unless the former has previously acquired some legal right to restrict the use which the latter shall make of such property. *The Auburn & Cato Plank Road Co. v. Douglass*, 9 N. Y. 444.

There is no injury in a legal sense which could give a right of action unless it is occasioned by violation of some duty owing to the injured. *Murphy v. City of Brooklyn*, 118 N. Y. 575.

Another illustration of the rule *damnum absque injuria* is injury resulting from a change of grade of a public street under lawful authority. It is held not to be taking private property for public use and the owner may not recover for the injury sustained by him. *Talbot v. N. Y. & Harlem R. R. Co.*, 151 N. Y. 155 (162).

The law is well settled in this State that where the property of an abutting owner is damaged, or even his easements interfered with in consequence of the work of an improvement in a public street conducted under a lawful authority, he is without remedy or redress, even though no provision for compensation is made in the statute. Whatever detriment the improvement may be to the abutter in such cases is held to be *damnum absque injuria*. *Fries v. N. Y. & Harlem R. R. Co.*, 169 N. Y. 270 (276).



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A possible damage to another, in the cautious and prudent exercise of a lawful right, is not to be regarded, and if a loss is the consequence it is "*damnum absque injuria*." *Panton v. Holland*, 17 Johns. 92 (100).

So long as the owner of property violates no duty which he owes to others or to the State, he cannot be called in question for the manner in which he uses or manages it; and if, in the lawful exercise of his right to so use it, another is injured, he is not liable. *Victory v. Baker*, 67 N. Y. 366.

A party is not liable for the consequences of an act done upon his own land, lawful in itself, and which does not infringe upon any lawful rights of another, simply because he was influenced in the doing of it by wrong and malicious motive; the courts will not inquire into the motive actuating a person in the enforcement of a legal right. *Phelps v. Nowlen*, 72 N. Y. 39.

The owner of land may dig an excavation in his own premises, not substantially adjoining a public highway, and no action lies against him by one who has strayed off the highway and fallen into the excavation. *Hardcastle v. S. Y. R. R. Co.*, 4 Hurlst. & Norm. 67; *Hounsel v. Smith*, 29 L. J. (C. P.) 203; *Ilott v. Wilkes*, 3 Barn. & Ald. 304; *Nicholson v. Erie Ry. Co.*, 41 N. Y. 525.

But a different rule prevails when the pit dug is so near the highway that a person in using the same with ordinary caution may fall in. See *Beck v. Carter*, 68 N. Y. 283, where the authorities are reviewed.

The reason of the rule in the latter case is that a person lawfully using the highway in a reasonable manner is liable to fall in the pit, and where such is the case, a duty is imposed upon the owner to protect the excavation. In other words the right of the passer-by is interfered with. *McAlpin v. Powell*, 70 N. Y. 126 (133).

The proposition that one cannot be held liable for the exercise of a legal right in a proper manner and that one is liable for the invasion of the right of another is shown by the rule as to liability for blasting. When the injury is not direct, but consequential, such as is caused by concussion by a blast, which, by shaking the earth, injures property, there is no liability in the absence of negligence. *Benner v. Atlantic Dredging Co.*, 134 N. Y. 156; *Booth v. R., W. & O. T. R. R. Co.*, 140 N. Y. 267.

But where a blast was exploded causing a piece of wood to fall upon a person lawfully traveling in a highway, the person explod-

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ing the blast was held liable, although no negligence was shown, upon the ground that he was a trespasser. *Sullivan v. Dunham*, 161 N. Y. 290.

In both cases plaintiff was injured through the act of the defendant. In the one he had the right of recovery; in the other no legal right was invaded and plaintiff could not recover.

In the one case the owner acted within his legal rights by setting off a blast with due care on his own land and it was *damnum absque injuria*, the adjoining owners though suffering damage, suffered no legal injury and had no right of recovery, in the other case, the trespass on his land gave him a right of action.

## ARTICLE II.

### THE LAW MUST GIVE A REMEDY.

Pollock (p. 22) says that it is a wrong to do willful harm to one's neighbor without lawful justification or excuse, and that since there is a positive duty to avoid harm, there exists a negative duty of not doing willful harm; but that only that harm which falls within one of the specified categories of wrong-doing entitles the person aggrieved to a legal remedy.

Cooley (p. 66) says of the rule that it is the conjunction of wrong and damage that creates a tort; that although damage is a necessary element in an actionable wrong, it is sometimes damage merely implied or presumed, not damage shown, citing, at page 69, the celebrated saying of Lord Holt from *Ashby v. White*, 2 Ld. Raym. 938; s. c., 1 Smith Lead. Cas. 425: "The damage is not merely pecuniary, for if a man gets a cuff on the ear from another, though it cost him nothing, no, not so much as a little diachylon, yet he shall have his action, for it is a personal damage."

And of Buller, J., in *Hobson v. Todd*, 4 Term R. 71 (73). "Here," says this judge, "is a wrongdoer, and the plaintiff is entitled to an action without proving any specific damages."

This means that in a certain class of cases, in order to meet the requirement that damage must follow the invasion of a legal right, the law presumes damage. Bigelow (§ 58), places this presumption upon the ground that rights of liberty, property, and reputation must be protected. It will be noted that in actions for false imprisonment, slander, libel, and trespass, involving the liberty of the person, the protection of reputation, and the conversion of property, the law does presume damage upon

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proof of the violation of the right, and it is only in such cases as the law does not make such an assumption, that it is necessary to prove actual damage in order to maintain an action.

Hale (p. 54 *et seq.*) makes the distinction between cases in which damage is presumed and damage must be proven; that is, between those cases where the law authorizes a recovery for a wrong without proof of damage being given, upon the ground that the law presumes damage for forbidden conduct, while for authorized conduct no such presumption is had and damages must be proven. His view is that the rights which correspond to "absolute rights," as classified by some writers, are such as must be preserved inviolate, and that in this class of cases it is sufficient to simply prove a wrongful act; proof of damage being relevant with respect to compensation, but not with respect to the existence of cause of action, he adds: "In all other cases the law indulges in no presumption, but leaves the party complaining of the wrong to prove it by showing the presence of both these essential elements, the conduct itself and the resulting damage." He says further (at p. 60), that with regard to conduct neither expressly authorized nor expressly forbidden, there is a third class in which liability must be referred to the right of immunity from harm; and that in this case damage is never presumed, but must be proven, where the violation of a right is not shown.

His conclusion is that the law has pursued no consistent theory of liability. Citing 7 American Law Review, 652; Holmes Common Law, 79; Jaggard on Torts, 48; *Wabash, etc., R. R. Co. v. Locke*, 112 Ind. 404.

### ARTICLE III.

#### THE WRONGFUL ACT MUST BE THE CAUSE OF THE INJURY.

It is enough in all cases that the wrongdoer knows, or is bound to know from the facts of which he is aware, that harm will follow, or is likely to follow, his improper act or omission in the understood state of things. \* \* \* This way of putting the case, which is now the usual way, puts aside the persistent doctrine or dogma that a man intends the natural and probable consequences of his conduct. Bigelow, 47.

There will be no tort where the loss or damage is such as would not usually be found to follow from the unauthorized act or omission, unless it can be shown that the defendant knew, or had

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reasonable means of knowing, that consequences not usually resulting from such an act or omission were, by reason of some existing cause, likely to intervene so as to cause such damage. *Underhill*, 22.

A long series of judicial decisions has defined proximate or immediate and direct damages to be the ordinary and natural results of the negligence, such as are usual, and therefore might have been expected. *Webb's* notes to *Pollock*, 42, citing *Phillips v. Dickerson*, 85 Ill. 11, 28 Am. Rep. 607; *Pennsylvania R. R. Co. v. Hope*, 80 Pa. St. 373, 21 Am. Rep. 100; *Bellefontaine, etc., R. Co. v. Snyder*, 18 Ohio St. 399, 98 Am. Dec. 422; *Lane v. Atlantic Works*, 111 Mass. 136; *Hill v. Winsor*, 118 Mass. 251.

"The question always is, Was there an unbroken connection between the act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." *Milwaukee & St. Paul R. R. Co. v. Kellogg*, 94 U. S. 469.

This rule is well illustrated by the celebrated squib case — *Scott v. Shepard*, 2 W. Bl. 892 — which has been cited and followed in numerous authorities in this State, among the earlier, *Guille v. Swan*, 19 Johns. 381, where it was held with regard to the liability of a balloonist descending in plaintiff's garden, that "if his descent under such circumstances would ordinarily and naturally draw a crowd of people about him, either from curiosity or for the purpose of rescuing him from a perilous situation, all this he ought to have foreseen and must be responsible for." Followed by *Vandemburgh v. Truax*, 4 Den. 464, where it is held that even if no mischief may be intended, yet, if a man do an act which is dangerous to the person or property of others and evinces a reckless disregard of consequences, he will be answerable severally for the injuries which may follow. *Thomas v. Winchester*, 6 N. Y. 397 (410), an action against a dealer in drugs, who carelessly sold a deadly poison as a harmless medicine, holds that the de-

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fendant is justly responsible for the probable consequences of his act. The balloon case and *Thomas v. Winchester* are cited as giving support to the conclusions of the court in *Gibney v. State*, 137 N. Y. 1 (6). While the squib case, the balloon case, and the case of the boy knocking out the faucet of a cask of wine (*supra*) are all considered in *Swain v. Schiefflin*, 134 N. Y. 471 (477), as leading to the conclusion of the court that the injuries, results which may or ought to be foreseen, of the wrongful or negligent act are also deemed the proximate consequences of it.

The law requires that the injury complained of must proceed so directly from the wrongful act that according to common experience and the usual course of things it might under the particular circumstances have reasonably been expected. To justify a recovery of damages they must be the natural and proximate consequences of the act complained of. These principles are elemental. *Jex v. Strauss*, 122 N. Y. 293, per Vann, J., 301.

The wrong and the injury must stand in the relation of cause and effect, or in other words, the act complained of must be the proximate cause of the injury sustained. In *Lowery v. Manhattan Ry. Co.*, 99 N. Y. 158, this question is fully considered in the opinion of Miller, J., and the earlier authorities collated and commented upon, including *Scott v. Shepherd*, 2 W. Bl. 892. The leading cases of *Lynch v. Nurdin*, 1 Ad. & El. (N. S.) 29, and *Guille v. Swan*, 19 Johns. 381, are also considered at some length. The court holds that it is enough to charge a defendant that he is the author and originator of the wrongful act which produced the injury, and wherever it appears that the effect of the defendant's act was the probable and natural consequence of said act, he is liable therefor. *Vandenburgh v. Truax*, 4 Den. 464, is also cited and commented upon, it being distinguished from *Ryan v. N. Y. C. & H. R. R. Co.*, 35 N. Y. 210.

This subject was still more fully considered in *Laidlaw v. Sage*, 158 N. Y. 73, where it was held that the principle of proximate cause is applicable to actions for tort, and that the extent of an injury cannot be attributed to a cause unless without its operation it would not have happened; and it is said that the proximate cause of the event is that which in a natural and continuous sequence unbroken by any new causes produces that event, and without it that event would not have occurred; that the act of one person cannot be said

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to be a proximate cause of an injury when the act of another person has intervened and directly inflicted it. The opinion of the court, per Martin, J., considers the definitions of proximate cause laid down by the text-writers, and collates the leading cases in this State, more especially the more recent authorities in the Court of Appeals. This case is followed in *Seifter v. Brooklyn Heights R. R. Co.*, 169 N. Y. 254 (259).

The principle that an actionable injury must result from the act of the defendant, and that it must bear to the act of the defendant the relation of cause and effect following from a moving cause, is considered in *Hoffman v. King*, 160 N. Y. 618, where the court considers more particularly the authorities on this subject growing out of fires caused by negligence.

The rule is, as laid down in *Laidlaw v. Sage*, *supra*, that where the injury is occasioned by one of two causes, for one of which defendant is responsible, and for the other of which he is not responsible, plaintiff must fail if he does not show that the damage was produced by the former cause. This, however, does not affect the principle of *Barrett v. Third Ave. R. R. Co.*, 45 N. Y. 628, that where the acts of two defendants contributed to the injury both defendants are liable.

Hirschberg, J., in *Leeds v. N. Y. Telephone Co.*, 79 App. Div. 122, considers very fully upon citation of the leading authorities in this State, the rule as to the meaning of the maxim *causa proxima, non remota, spectatur*, stating that it does not mean that the cause which is nearest in time or space to the result is necessarily to be regarded as the proximate cause, but that the primary cause may be the proximate cause of a disaster.

The question of proximate cause, as well as the rule that one is responsible for the probable consequences of his acts, are especially important in the law of negligence, where its principles are most frequently applied. It frequently arises where special damages are claimed in slander and libel, as in many other cases.

It follows that in order that there may be a recovery in tort, three things must concur. *First*. A legal right must be violated, and the party seeking redress must suffer injury, which injury must be either proven or presumed by law. *Second*. The injury must be the natural result of the wrongful act. *Third*. It must be a case where the law allows a remedy.

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## ARTICLE IV.

## MALICE AS AN ELEMENT IN TORTS.

Very much has been written as to whether malice is a necessary, or even proper, element to be considered in connection with torts generally, and the discussion has taken an exceedingly wide range. The word "malice" has been characterized by English judges as "that unfortunate word." *Abrath v. North Eastern Ry. Co.* (1886), 11 App. Cas. 247 (253). As that unfortunate epithet. *Allen v. Flood* (1898), App. Cas. 1 (50). As a word which is susceptible of many different meanings." In *Allen v. Flood*, p. 92, Sir James Fitzjames is said to have used this language: "It seldom has any meaning except a misleading one." The general view of lawyers and judges may be epitomized in the language quoted by Mr. Krauthoff in his article on "Malice as an Ingredient in a Civil Cause of Action," (Report American Bar Assn. (1898), pp. 335-351) from the opinion of Lord Macnaghten in *Allen v. Flood*, p. 144. "Sometimes, indeed, I rather doubt whether I quite understand that unhappy expression myself." This difficulty seems to have arisen not only from the use of the word "malice" in two different senses, and to convey two distinct ideas, but still further from its use in connection with actions for torts, for two separate and distinct purposes. *First.* It means a wrongful act intentionally done in the willful violation of a known right. *Allen v. Flood* (1898), App. Cas. 64. A conscious violation of the law to the injury of another. *Ferguson v. Earl of Kinnoul*, 9 Cl. & F. 321; *Whitefield v. Southeastern Ry. Co.*, El. Bl. & El. 115 (121). *Second.* The word "malice" in its proper signification means ill-will, spite, or bad motive as against another, or recklessness toward the rights of others. *Allen v. Flood*, p. 63. *Third.* In addition to these conflicting uses of the word, the first denoting the so-called "malice in law," the second, "malice in fact;" the latter malice is defined as "the mental condition or purpose which judicial decision has made an indispensable condition to the wrong" in certain actions of tort, of which malicious prosecution is the type. Bishop, § 231. This means that such "actual malice," "express malice," or "malice in fact" must be shown to sustain the action, and this

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is also true of libel and slander where the defense of privilege is interposed.

But in most torts "actual malice" is not necessary to be shown to sustain a recovery, but it is sufficient to show that the act is wrongful. In these cases, however, "malice in fact" may play an important part since it is admissible, and, in fact, necessary, for the recovery of exemplary damages, or damages by way of punishment in excess of compensatory damages, which will be awarded independent of motive. However in these cases a cause of action must exist independent of exemplary damages. Some actual loss must be proved, or as in case of libel and slander, presumed as the consequence of the act complained of. Hale on Damages, 207 *et seq.*, and cases cited.

Malice is said to be divided into classes corresponding to the use of words in its different meanings, as above stated. *First.* Express malice; malice in fact, or actual malice; and *Second.* Implied malice; malice in law, or constructive malice. Express malice being personal spite or ill-will, and implied malice the wrongful act done intentionally without just cause or excuse. 19 Am. & Eng. Encyc. of Law, 624.

Malice in fact is not confined to personal spite or ill-will, but includes every unjustifiable intention to inflict injury on the person defamed; or in the words of Brett, L. J., every wrong feeling in a man's mind. *Stuart v. Bell* (1891), 2 Q. B. 351, cited Fraser on Libel and Slander, 46, to which the author adds: "It would greatly tend to accuracy of thought and clearness of expression in connection with this branch of the law, if the word 'malice' were only used in the sense of malice in fact, since it only leads to confusion to use it in the sense of malice in law, the intention of doing an act which in fact is the breach of a general legal duty, whether the actor knows it or not."

Bigelow (on Torts, § 35) says: "Malice is one of the most perplexing terms of the law especially in relation to civil liability; it is continually used in different and conflicting senses." The author further says that "popular malice" imports an evil motive or design, but that ordinarily malice in law does not import motive, but simply that the act in question was done with knowledge that it would do harm, or with knowledge that it was unjust or reckless, or with wanton disregard of another's rights. Citing



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to this proposition, *Savage v. Brewer*, 16 Pick. 453; *Gott v. Pulsifer*, 122 Mass. 235.

"Malice, in legal phraseology, signifies the contemplation of the doing of a wrongful act toward another person. In its legal sense, it ranges from malevolence, as in an injury committed in revenge, to the mere conscious violation of a right without just cause or excuse, as in the case of a mere trespass. Malice is said to have been present whenever the injurer contemplated harm to the person injured, though he may also have entertained a desire to benefit himself, and though the harm contemplated may be merely incidental to the fruition of that desire. \* \* \* Malice in law, or implied malice, does not refer to the consciousness of the wrongdoer, nor to motive, but to knowledge of wrongdoing. It is the inference of law from facts in evidence. It is proved by showing actual occurrences." Hale on Torts, 34-35.

Bishop (§ 231) says the word "malice" is very much used in legal writings, but its meaning is variable, depending largely upon the subject to which it is applied. Citing the definition from *Bromage v. Prosser*, 4 B. & C. 247 (255), that "In its legal sense it means a wrongful act done intentionally without just cause or excuse," and "ill-will against a person is not necessarily an ingredient therein."

This definition is intended to apply to malice at law as distinguished from malice in fact, and is the malice which enters most largely into actions for tort, since malice in fact is defined in the same section as "not a mere fiction of law."

These definitions and distinctions seem to fully justify the drastic language of Mr. Krauthoff that "by means of glosses, expositions, and efforts to justify its presence in the law of civil actions, it (malice) has become a term whose varied meanings can be likened to nothing short of Joseph's coat of many colors."

The article referred to is an exceedingly painstaking and thorough review of the relation of malice to torts, analyzing the leading case of *Allen v. Flood* (1898), App. Cas. 1, of which it was said in a legal periodical that: "It is one of the rare discussions whose effects are not fully worked out for many years." Of this case Mr. Krauthoff says, after a careful review of the opinions, that there was substantial unanimity on the proposition that as a general rule a bad motive alone cannot create a cause of action. Further, that it is a universal rule of the common law that an act

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lawful in itself is not converted by a malicious, *i. e.*, bad or indirect motive, into an unlawful or tortious act.

Cooley, on p. 830, cites *Stevenson v. Newnham*, 13 C. B. 285, 297, as holding that, "an act which does not amount to a legal injury cannot be actionable because it was done with a bad intent," and *Jenkins v. Fowler*, 24 Pa. St. 308 (310), "That any transaction which would be legal and proper, if the parties were friends, cannot be made the foundation of an action merely because they happen to be enemies." The author sums up the proposition as follows: "To state the point in a few words, whatever one had a right to do, another can have no right to complain of," and lays down what seems to be the true general rule that bad motive by itself is no tort; that malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful. Citing *Mahan v. Brown*, 13 Wend. 261; *Panton v. Holland*, 17 Johns. 92. In the former case it was held that whether motives of the defendant in building a fence, obstructing the air and light from entering plaintiff's windows were good or bad, plaintiff had no legal cause for complaint.

In *Auburn & Cato Plank Road Co. v. Douglass*, 9 N. Y. 444, Sheldon, J., speaking for the court, in opinion in which all concurred, cites *Mahan v. Brown*, 13 Wend. 261, and *The Newburg Turnpike Co. v. Miller*, 5 Johns. Ch. 101, to the proposition that the motive with which a party acts is not ordinarily an essential inquiry in a litigation, as bearing upon the right of recovery. The learned judge proceeds (p. 450): "But, independently of authority, if a malignant motive is sufficient to make a man's dealings with his own property, when accompanied by damage to another, actionable, where is the principle to stop? It will be found to apply to a thousand other cases with the same force as to this. For instance, if a man sets up a trade, not with a view to his own profit, but solely to injure one already established in the same trade, how can the case be distinguished in principle from this? So, if one compels his debtor to pay, not because he wants the money, but that the latter may call upon his debtor, and thus ruin him; or if one who holds stock in an incorporated company, with a view to depreciate the stock and thus injure some other holder, throws his stock upon the market and sells at a great sacrifice; would not these cases fall within the same principle?

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and yet no one would contend that an action would lie in these or similar cases."

In *Clinton v. Myers*, 46 N. Y. 511, at p. 520, opinion by Grover, J., it is said in relation to finding a fact that the defendant had acted from a bad motive and for the purpose of annoying the plaintiff. This is immaterial. Courts have no power to deny to the party his legal right because it disapproves his motives for insisting upon it.

In *Phelps v. Nowlen*, 72 N. Y. 39, cited *Chenango Bridge Co. v. Paige*, 83 N. Y. 178 (190), it was held that a party is not liable for the consequences of an act done upon his own land lawful in itself, and which does not infringe upon any legal rights of another, simply because he was influenced in the doing of it by wrong or even malicious motives. At p. 49 Washburn on Easements is quoted as citing from 8 Gray, 410, that "If the defendant had authority and acted within the scope of it, he is not a trespasser because his motives or purpose with regard to the plaintiff were unkind or malicious."

One who exercises a legal right simply cannot be made liable because his action was instigated by wantonness or malice. The exercise of a legal right cannot be affected by the motive which controls it. *Kiff v. Youmans*, 86 N. Y. 324.

In *Lough v. Outerbridge*, 143 N. Y. 271, it is said: "The purpose of the act which in itself is perfectly lawful, or, under all circumstances, reasonable, is seldom if ever material."

In *Rich v. N. Y. C. & H. R. R. Co.*, 87 N. Y. 382 (394), it is said: "Whatever or however numerous or formidable may be the allegations of conspiracy, of malice, or oppression, of vindictive purpose, they are of no avail. They merely heap up epithets, unless the purpose intended, or the means by which it is to be accomplished, are shown to be unlawful."

The fact that an act is malicious is of no importance in determining its legal character. In *Paine v. Chandler*, per Brown, J., 134 N. Y. 385 (390), "A person may do what he pleases upon his own land, and so long as he violates no legal duty that he owes to his neighbor, he is not liable, although he may perform the act for the sole purpose of injuring his neighbor."

The rule on this subject seems to be summed up in a general way in *Heald v. Carey*, 11 C. B. 977 (993), that "A man's motive may not make wrongful an act which in itself is not wrongful,"

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or as stated in *Stevenson v. Newnham*, 13 C. B. 285 (297), "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent."

*National Protective Assn. v. Cumming*, 170 N. Y. 315, Parker, Ch. J., says, *arguendo*, p. 326: "It seems to me illogical and little short of absurd to say that the every-day acts of the business world within the dominion of competition may be either lawful or unlawful according to the motive of the actor."

In brief of counsel in this case, at p. 318, numerous authorities are referred to as sustaining the proposition that the motive for doing an act cannot of itself change its character from lawful into unlawful.

The conflicting views as to the general proposition whether malice is material or otherwise as a motive are sought to be reconciled in *Plant v. Woods*, 176 Mass. 492, upon the theory that "In many cases the willfulness of an act which causes damage to another may depend upon whether the act is for justifiable cause, and this distinction may be found sometimes in the circumstances under which it is done irrespective of motives; sometimes in the motive alone, and sometimes in the circumstances and motive combined." An explanation which seems somewhat too metaphysical for practical use.

It is contended, and with much reason, that even in malicious prosecution, the gist of the action is not malice but "want of probable cause," and that malice is inferred only when want of probable cause is shown, and that it is not sufficient to show actual malice, provided probable cause existed for the commencement of the action. The question is quite fully discussed in "Two Centuries' Growth of American Law," article on Torts, by George D. Watrous, at p. 106, etc. He says: "To appreciate fully the importance of *Allen v. Flood*, we must bear in mind that lawyers, judges, and laymen have long been under the influence of a feeling, amounting almost to superstition, that there was something magical about the word 'malice,' and that the mere insertion of this word in a declaration would convert otherwise innocent into tortious acts. The fog has been gradually rising, and this case has, so far as England is concerned, swept it away. \* \* \* *Mayor, etc., of Bradford v. Pickles* also contributes its share toward clearing away the baleful influence of the conception of malice. As a result of these cases, it is now settled that, in gen-

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eral, bad motive is no tort, and that an allegation of malice has no effect as to acts free from any other element of wrongdoing. \* \* \* Even in the law of slander and libel, the tendency of modern thought is to base them upon the use of language, false and injurious, generally or under the special circumstances; while the gist of malicious prosecution is that criminal proceedings were taken against the plaintiff without reasonable and probable cause. These are apparent, not real, exceptions to the general rule. Cases of qualified privilege stand almost alone in requiring actual proof of malice, or lack of good faith."

Malicious motives alone can never constitute a cause of action, but where the allegations are sufficient to sustain the action, independent of malice, it may be alleged and proved in enhancement of damages. Webb's note to Pollock on Torts, p. 33, citing *Morris v. Scott*, 21 Wend. 281; *Auburn, etc., R. R. Co. v. Douglas*, 9 N. Y. 444; *White v. Carroll*, 42 N. Y. 161.

Hence, there is malice which is simply presumed in certain cases because the act is wrongful and requires no proof. Malice which indicates ill-will, or a bad heart, must, in certain cases, be proved to sustain an action, and may also be shown in actions for tort where it is not a necessary element, when a cause of action has been made out, solely to aggravate damages and authorize the finding of punitive damages or smart money; while motive plays a very important part, when unlawful proceedings are under consideration, yet, the law does not ordinarily consider the motives by which people are actuated in doing lawful acts. *Reynolds v. Plumbers' Assn.*, 30 Misc. Rep. 709 (716), 63 N. Y. Supp. 303.

While the great weight of authority is against the theory that a wrongful intent or actual malice will give a right of action (see *Besson v. Southard*, 10 N. Y. 236, opinion Gray, J., in *Willard v. Holmes*, 142 N. Y. 495), still it is very clear that in the present state of the law exemplary damages are awarded by reason of the existence of actual or express malice, that is to say, wrongful motive. This will clearly appear on examination of the authorities as to Exemplary Damages under that title.

Cooley, at p. 836, sums up the whole matter in the statement that it cannot be said that motive is entirely unimportant, even when one is exercising an undoubted legal right, but that *generally* it becomes important only when the damages for a wrong are

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to be estimated as an element of mitigation or aggravation, and then is of the highest importance.

The term "malice" has become so thoroughly part and parcel of the law relating to certain torts, such as libel, slander, and malicious prosecution, that it is exceedingly difficult to distinguish between such malice, as is claimed to give a right of action, as in the case of malicious prosecution, and such malice as simply tends to increase damages, as in actions for libel and slander, since the term "actual malice," or "express malice," and "malice" are frequently so used in the discussion of this question, as to give rise to very great confusion.

### ARTICLE V.

#### TORTS ARISING FROM OR CONNECTED WITH CONTRACTS.

Bishop (Non-Contract Law, § 72) says that there is "a not well-defined space within which tort and contract mingle or blend, or overlies each other, in words partly plain and familiar and partly obscure," referring to his work on Contracts, §§ 183, 187, 216 and 228, for further explanations.

It is customary in the law to arrange the wrongs for which individuals may demand legal redress into two classes: the first embracing those which consist in a mere breach of a contract, and the second those which arise independent of contract. The classification is not very accurate. Many cases exist where the complaining party may, on the same state of facts, at his option, count upon a breach of contract as his grievance, or complain of a wrong in a manner that puts the contract out of view. Breaches of contract are failures to perform agreements, and the actions for redress in the courts of law are actions on contracts, or actions *ex contractu*. Other acts or omissions giving rise to a suit at law were called specifically wrongs or torts, and the actions by which redress is to be obtained are called actions for torts or actions *ex delicto*. Cooley, 2.

Whenever there is a contract, and something to be done in the course of the employment, which is the subject of that contract, if there be a breach of duty in the course of that employment, the plaintiff may recover, either in tort or in contract. Underhill, 37, citing *Brown v. Boorman*, 11 Cl. & F. 1.

Although a tort has been defined as a wrong independent of

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contract, there is, nevertheless, a class of injuries which lie on the borderland as it were, between contract and tort, and for which an action *ex contractu* or *ex delicto* may generally be brought at the pleasure of the party injured. Underhill (p. 37), illustrating the rule by *Seare v. Prentice*, 8 East, 348, holding that if an apothecary unskillfully administer improper medicine to a patient, whereby he is injured, he may sue either for breach of his implied contract to use reasonable skill and care or for tortious negligence. Also that where a person having an estate for years commits waste, it is a breach of his implied contract to deliver up the premises in as good a condition as when he entered upon them, and is also an injury to the reversion, which is a tort.

Keener, at p. 16, classifies quasi-contracts, outside of those which rise upon a judgment, as arising either upon a statutory or official or customary duty on the one hand, or upon the doctrine that no one shall be allowed to enrich himself unjustly at the expense of another.

Pollock (p. 646) describes as constituting the border-line between the law of tort and the law of contract, causes of action nominally in contract, which are not founded on the breach of any agreement, and torts which are not in any natural sense independent of contract.

There are certain kinds of employment, such as carrier and innkeeper, being public in a certain sense. The law casts on people acting in these employments the duty of not refusing the benefits thereof, so far as his means extends to any person who properly applies for it. The innkeeper must not, without reasonable cause, refuse to entertain a traveler, or the carrier to convey goods. Thus there is a duty attached to the employment antecedent to the formation of any contract, and if the duty is broken, there is not a breach of contract but a tort. In effect refusing to enter into the contract is of itself a tort. Pollock, 650.

Keener says, at p. 18, citing English authorities: "Of a quasi-contractual nature, it is submitted, is the duty of a carrier, founded upon the custom of the realm to receive and to carry safely. That the liability in such cases arises not from contract, but from a duty, is clear. While it is true that the liability is ordinarily described as one in tort, it is submitted that it has been so described because of the usual classification of legal rights into contracts and torts, and that since the obligation im-

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posed upon the carrier is *to act*, the obligation is really quasi-contractual in its nature, and not in the nature of a tort. If this be the proper classification of the duties imposed by law upon a carrier, it must necessarily be true of the common-law liability of an innkeeper to receive guests, or to keep their goods safely."

In *Nolton v. Western R. R. Corporation*, 15 N. Y. 444, the question is considered as to whether the liability of a common carrier rests upon contract or failure to perform a duty imposed by law. Distinguishing *Coggs v. Bernard*, *Ld. Raym.* 909, *Selden, J.*, holds that the basis of such an action is the violation of the duty or obligation. Cited with approval, *Brewer v. N. Y., L. E. & W. R. R. Co.*, 124 N. Y. 59 (64).

As to actions against common carrier sounding in tort, see *Campbell v. Perkins*, 8 N. Y. 430, 438; *Burtis v. B. & S. R. R. Co.*, 24 N. Y. 269 (280).

The subject is quite fully considered in *People ex rel. Dusenbury v. Spier*, 77 N. Y. 144, opinion Danforth, J., p. 150, where it is stated that where money is improperly obtained from another, the law implies a promise from the wrongdoer to restore it, although it is obvious that this is the very opposite of his intention; and compares constructive contracts of this nature with constructive trusts in courts of equity, calling attention to the somewhat similar rule of the civil law, and citing Blackstone, vol. 3, p.165, to the point. He also illustrates the right to waive the tort by stating that if money is stolen, its owner may sue the thief for conversion, although he may also sue him for money had and received to his use.

*The National Trust Co. v. Gleason*, 77 N. Y. 400, the court, per Rapallo, J., considers the evidence necessary to a recovery in an action on a contract arising out of a wrongful act, discussing the doctrine known as "unjust enrichment."

"An action in the nature of an action of assumpsit lies against one who has obtained money from another by a fraud, and such a claim is a proper subject of set-off in an action brought by the party against whom it exists. An assignee of such party takes a cause of action subject to such defense. This money thus obtained is, in contemplation of law, money received for the use of the party who is defrauded, and the law implies a promise on the part of the person who thus obtains it to return it to the rightful



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owner. The tort arising from the manner in which the money was obtained may be waived and the action founded upon the implied contract." *Rothschild et al. v. Mack*, 115 N. Y. 1 (8).

The right of action for tort growing out of contract is considered in *Rich v. N. Y. C. & H. R. R. Co.*, 57 N. Y. 382, where Judge Finch cites with approval the rule from 1 Chitty's Pleading, 135, that "If a common-law duty result from the facts, the party may be sued in tort for any negligence or misfeasance in the execution of the contract."

The common law abhors all manner of fraud, and wherever a person is injured by fraudulent acts or contrivances of another it will afford a remedy. 1 Com. Dig. 178, Action on the Case; Cro. Jac. 193; Cro. Eliz. 701; 1 Com. Dig. 222. Cited opinion counsel in *Yates v. Joyce*, 11 Johns. 136, 140. It is said in that case, per Curiam: "It is obvious, however, from the statement of the plaintiff's case, in the declaration, the truth of which is admitted by the demurrer, that he has sustained damage by the act of the defendant, which he alleges was done fraudulently, and with intent to injure him. It is the pride of the common law that whenever it recognizes or creates a private right, it also gives a remedy for the willful violation of it."

This language is cited with approval in *Gardner v. Heartt*, 3 Den. 232 (235).

In *Van Pelt v. McGraw*, 4 N. Y. 110 (111), it is said: "It forms no objection to this action that the circumstances of the case are novel, and that no case precisely similar in all respects has previously arisen. The action is based upon very general principles, and is designed to offer relief in all cases where one man is injured by the wrongful act of another, where no other remedy is provided. This injury may result from some breach of positive law, or some violation of a right or duty growing out of the relations existing between the parties."

Ordinarily, the essence of a tort consists in the violation of some duty due to an individual, which duty is a thing different from mere contract obligation. When such duty grows out of relations of trust and confidence, as that of the agent to his principal or the lawyer to his client, the ground of the duty is apparent, and the tort is, in general, easily separable from the mere breach of contract. But where no such relation flows from the constituted contract, and still a breach of its obligation is made

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the essential and principal means, in combination with other and perhaps innocent acts and conditions, of inflicting another and different injury, and accomplishing another and different purpose, the question whether such invasion of a right is actionable as a breach of contract only, or also as a tort, leads to a somewhat difficult search for a distinguishing test. *Rich v. N. Y. C. & H. R. R. Co.*, 87 N. Y. 382 (390).

From the very nature of the questions arising, it is exceedingly difficult, if not impracticable, to lay down any given set of rules which shall be applicable to the majority of cases arising under this classification, covering, as it does, the border line between contract and tort, and the matter is well summed up by a recent text-writer, who says: "With respect to quasi-contracts, the confusion is perhaps inextricable." All that can be done to aid the practitioner is by the way of citation of some of the leading authorities upon the subject. For anything like a full consideration of the subject, a full examination of the authorities in this and other jurisdictions, more particularly the cases decided by the English courts, is absolutely essential.

The subject is very fully and ably treated by Prof. Keener in "Quasi-Contracts," where the authorities are collated and classified. See also "Waiver of Tort" under "Remedies."

## CHAPTER IV.

### RULES GOVERNING RIGHTS OF PARTIES IN TORTS.

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#### ARTICLE I.

##### INFANTS.

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##### SUBDIVISION 1.

##### Nature and Extent of Liability.

The law with respect to the liability of infants has proceeded rather upon the theory of compensation to the injured party than

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of consistently maintaining any logical doctrine as to the mental attitude of the wrongdoer or of basing the responsibility on the wrongful intention or inadvertence. The cases proceed upon the propriety of holding all persons liable for actual damages committed by them and of ignoring volition as a necessary element of a juridical cause. Tiffany on Persons and Domestic Relations, 407; Jaggard on Torts, 159.

A minor is liable, like a person of age, for his neglects, for his trespasses, for his assaults, commonly for his frauds, for his unlawful conversions of goods, for tortiously taking money, for the wrong of bastardy, and generally for whatever may be the subject of an action *ex delicto*. \* \* \* If the particular wrong is both a tort and a breach of contract—not a violation also of a duty which the law has superinduced upon and above the contract—then, if infancy would be a defense to an action on the contract, it will be equally such should the injured party elect to sue in tort. Bishop, §§ 565, 566.

The general rule is that an infant is responsible for his torts as all other persons would be. \* \* \* The intent with which the wrongful act was done is unimportant except as it may in some event bear upon the question of damages. But in those cases in which malice is a necessary ingredient of the wrong an infant may or may not be liable according as his age and capacity may justly impute malice to him or preclude the idea of his indulging in it. Cooley (2d ed.), 120.

“Where the minor has committed a tort with force, he is liable at any age; for in case of civil injuries with force, the intention is not regarded; for in such a case a lunatic is as liable to compensate in damages as a man in his right mind.” Reeve’s Dom. Rel. 258.

“The privilege of infancy is purely protective, and infants are liable to actions for wrong done by them; as to an action for slander, an action of trover for property embezzled, or an action grounded on fraud committed.” Macpherson on Infants, 481 (41 Law Lib. 350).

“Infants are liable for torts and injuries of a private nature; as disseisins, trespass, slander, assault,” etc. Bingham on Infancy, 110.

“All the cases agree that trespass lies against an infant.” Erwin on Torts, p. 65.

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Kent (2 Comm. 241) cited *Munger v. Hess*, 28 Barb. 75 (78): "Infants are liable in actions arising *ex delicto*, whether founded on positive wrongs, as trespass or assault, or constructive torts or frauds. But the fraudulent act, to charge him, must be wholly tortious, and a matter arising *ex contractu*, though infected with fraud, cannot be changed into a tort, in order to charge the infant in trover, or case, by a change in the form of the action. He is liable in trover, for *tortiously converting* goods entrusted to him, and in detinue, for goods delivered upon a special contract for a specific purpose, and in assumpsit for money which he has fraudulently embezzled."

Where the substantial ground of action rests upon promise, the plaintiff cannot, by changing the form of action, render a person liable who would not have been liable on his promise. Cooley (2d ed.), 124, citing *Greene v. Greenbank*, 2 Marsh. 485.

Infants are generally liable in law for their torts not in any wise connected with contract. They can neither escape liability because commanded by another to do a wrong, nor create liability on their own part by authorizing and adopting the commission of the tort of another person. Hale, 96.

An infant is not allowed to take advantage of his own fraud and will be liable in equity to make restitution, where that is possible, for any advantage he has thereby gained. Fraser (5th ed.), 7.

Every person who commits a tort not depending upon fraud or malice, and not arising out of the performance of a contract, is liable to be sued notwithstanding infancy, coverture, or unsoundness of mind. \* \* \* Every person who commits a tort depending upon fraud or malice is liable to be sued unless from extreme youth or unsoundness of mind he is mentally incapable of contriving fraud or malice. Underhill (7th ed.), 150.

Tenderness of age, in proportion as it affects capacity to act intelligently, may be material to their liability, where intention to do wrong or want of care is an essential ingredient to the injury. Hale, 76.

The responsibilities of infants vary with their years. Bishop, § 560.

The plea of infancy is not available in an action against an infant for seduction. \* \* \* Seduction is not in any way connected with the contract, but comes within the class of cases *ex*

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*delicto*, and may be maintained though the act was committed and the injury resulted during the minority of the wrongdoer. Rogers on Dom. Rel., § 726.

The question whether an infant is liable on his tort for falsely representing himself to be of full age, whereby he induced another to contract with him, is one upon which great difference of judicial opinions have been expressed. In England it is thoroughly established that he is not liable. The English cases have often been approved in this country, and the tendency of authority here is with them. But other cases hold to the contrary. Cooley on Torts (2d ed.), 126, and cases cited.

The fact that a tort is committed by an infant under authority or command of his parent may render the parent also liable, but it will not excuse the infant. Tiffany on Persons and Domestic Relations, 407; Jaggard on Torts, 160.

It seems that where infants are actors, that might probably be considered an unavoidable accident which would not be so considered where the actors are adults. *Bullock v. Babcock*, 3 Wend. 391; Tiffany on Persons and Domestic Relations, 408; Jaggard on Torts, 160.

An infant is responsible for a tort committed by him. *Campbell v. Stakes*, 2 Wend. 139, citing *Jennings v. Rundall*, 8 T. R. 335; *Green v. Greenbank*, 4 Eng. Com. Law Rep. 375, and cited with approval in *Campbell v. Perkins*, 8 N. Y. 430 (431); *M'Coon v. Smith*, 3 Hill, 147; *McCabe v. O'Connor*, 4 App. Div. 354, 38 N. Y. Supp. 572; latter case affirmed on opinion below, 162 N. Y. 600.

Infants are liable in the same manner as adults for trespass and assault. *Bullock v. Babcock*, 3 Wend. 391, cited and followed in *Williams v. Hays*, 143 N. Y. 442, the latter case collating numerous authorities upon the subject and substantially adopting the rule laid down in Reeve's Domestic Relations, that where a minor has committed a tort with force he is liable at any age. Same rule is held in *Tift v. Tift*, 4 Den. 175, having also been approved in the leading case of *Hartfield v. Roper*, 21 Wend. 615. It is reiterated in *Conkling v. Thompson*, 29 Barb. 218, where it is held that in an action *ex delicto* for injury to plaintiff's property, occasioned by the wrongful act of the infant, the infancy of the infant is no protection. He is as fully liable for damages sus-

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tained as if he were of full age. See also *Robbins v. Mount*, 33 How. 24; *Eckstein v. Frank*, 1 Daly, 334.

It is said in *Campbell v. Perkins*, 8 N. Y. 430 (440), citing *The People v. Kendall*, 25 Wend. 399, that "It is a well-settled rule that a matter arising *ex contractu*, though infected with fraud, cannot be changed into a tort in order to charge the infant by a change in the remedy." It is further said that the case of *Wallace v. Morss*, 5 Hill, 391, seems to militate against this doctrine, but that upon examination of that case it will be found that the authorities cited established nothing more than that the title to goods obtained by false representation does not pass, and the plaintiff was allowed to recover presumably in trover. *Green v. Greenbank*, 2 Marsh. 485; 4 Eng. Com. Law. Rep. 375, and *Campbell v. Stakes*, 2 Wend. 139, are cited with approval to the effect that the plaintiff cannot by changing the form of action make a person liable who would not have been liable on a promise.

In *Moore v. Eastman*, 1 Hun, 578, it is held that to render an infant, who has hired a horse, liable in an action for trespass, he must do some willful and positive act which amounts to an election on his part to disaffirm the contract; a bare neglect to protect the animal from injury, and to return it at the time agreed upon is not sufficient. If he willfully and intentionally injure the animal, an action of trespass will lie against him for the tort, but not if the injury complained of occurred in the act of driving the animal through his unskillfulness and want of knowledge, discretion, and judgment. Cited and same rule held in *Young v. Muhling*, 48 App. Div. 617, 63 N. Y. Supp. 181.

So fraudulent misrepresentations made by an infant to induce another to enter into a contract with him will not give it validity. *Studwell v. Shapter*, 54 N. Y. 249.

The liability of an infant for a fraudulent representation is considered in *Hewitt v. Warren*, 10 Hun, 560, citing, collating, and commenting upon numerous authorities holding that where the substantive ground of the action is contract, as well as where the contract is stated as an inducement to an alleged tort, infancy is a defense. In that case the aggrieved party retained the benefit of the contract and did not disaffirm it.

Authorities are also collated and considered in dissenting opinion in *Little v. Gallus*, 4 App. Div. 569 (582), 38 N. Y. Supp. 487.

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An infant who is the owner or occupant of lands is under the same responsibility as any other person for a nuisance, or for the negligent use or management of the property. *McCabe v. O'Connor*, 4 App. Div. 354, 38 N. Y. Supp. 572, affirmed on prevailing opinion below, 162 N. Y. 600.

In *Harvey v. Dunlop*, Hill & Den. Supp. 193, an action was brought against a defendant six years of age, who had thrown a stone and put out the eye of a neighbor's daughter. Though the defendant acknowledged the act it did not appear from the testimony that the injury was inflicted by design or carelessness, but, on the contrary, that it was accidental. *Held*, that the plaintiff could not recover. The court said: "In order to arrive at a decision upon this question the jury had a right to take into consideration the childhood of the parties; the friendly relations existing between them, the conduct of both on their return home, and, more especially, the repeated admission of the plaintiff that the defendant was not to blame," etc. \* \* \* "These admissions \* \* \* conduct us to the same conclusion arrived at by the jury that the misfortune happened without fault upon either side, and that it was one of those unhappy accidents to which children of the tender age of these parties are not unfrequently exposed in their little innocent plays and amusements — a result rather to be deplored than punished."

If an infant hire a horse to go a particular journey and goes beyond the place of destination, he is liable for conversion. *Fish v. Ferris*, 5 Duer, 49.

Infants cannot empower an agent or attorney to act for them, nor affirm what another may have assumed to do upon their account — they are not liable for torts alleged to have been committed by their agent. *Tiffany on Domestic Relations*, etc., 408; *Jaggard on Torts*, 160.

A promise to marry by an infant is not binding, and an action for breach thereof cannot be maintained. *Hamilton v. Lomax*, 26 Barb. 615.

Replevin for goods detained in violation of the terms of a conditional sale, being an action in tort, can be maintained against an infant. *Wheeler & Wilson Mfg. Co. v. Jacobs*, 21 N. Y. Supp. 1006.

"Where the infant pleads his minority to escape payment of a purchase price, the seller may rescind the sale and replevy the



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goods." Citing *Badger v. Phinney*, 15 Mass. 359. The words of Ld. Chan. Cowper in 2 Eq. Cas. 515, are cited with approval: "If an infant is old and cunning enough to contrive and carry out a fraud he ought to make satisfaction for it."

## SUBDIVISION 2.

## Liability of Parents for Torts of Infants.

A father, simply as a parent, is not responsible for any tort committed by his minor child. \* \* \* Though the relation of parent does not alone render the latter the servant of the former, the child often or commonly is such. \* \* \* In which case the parent will be to the same extent responsible for the child's acts as for those of any other servant. Bishop on Non-Contract Law, §§ 549-551.

A parent is not liable for the tort of an infant committed in his absence and without his authority. *Tift v. Tift*, 4 Den. 175, citing *McManus v. Crickett*, 1 East, 106.

*Foster v. Essex Bank*, 17 Mass. 479 (509), followed *Schlossberg v. Lahr*, 60 How. Pr. 450.

## SUBDIVISION 3.

## Statutory Regulations as to Actions by and against Infants.

The provisions of the Code as to appointment of a guardian *ad litem* for infant plaintiffs and defendants are sections 468-477 inclusive.

Under the provisions of the Code, section 468, an infant having a right of action is entitled to maintain it, and its prosecution need not be deferred or delayed on account of his infancy.

While ordinarily under the provisions of the Code a guardian *ad litem* must be appointed, yet, it has been held in civil causes that an action may be brought by an agent or testamentary guardian. *Carr v. Huff*, 57 Hun, 18, 10 N. Y. Supp. 361. At least unless the question is raised by demurrer. *Spooner v. D., L. & W. R. R. Co.*, 115 N. Y. 22; *Perkins v. Stimmell*, 114 N. Y. 359; *Segelken v. Meyer*, 94 N. Y. 473.

By section 396 it is provided that if a person entitled to maintain an action, except those specifically mentioned, is less than twenty-one years of age at the time when the cause of action accrues, the time of such disability is not a part of the time limited

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by the statute for commencing an action, except that it cannot be extended for more than one year after the disability ceases.

Hence, an infant may bring his action through his guardian before arriving at full age, or, under the preceding section, may await his coming of age without having his right of action affected by the statute of limitations, since section 396 is part of the title limiting the commencement of actions for torts.

A child cannot maintain an action for injury sustained while *en ventre sa mere*. *Walker v. G. N. Ry Co.*, 28 L. R. A. 69.

An infant under the age of fourteen years may be discharged from arrest as a privileged person in the discretion of the court. Code Civ. Proc., § 554. This provision is new in the Code, as it went into effect in 1877, and seems to render obsolete *Schuneman v. Paradise*, 46 How. 426, citing *Wallace v. Morse*, 5 Hill, 392.

SUBDIVISION 4.

Right of Parent to Recover for Injury to Child.

Where a minor is injured by a negligent act, the parents have the right of action, and the child has also a right of action. *Palmer v. Conant*, 58 Hun, 333, 11 N. Y. Supp. 917, citing *Cuming v. Brooklyn City Ry. Co.*, 109 N. Y. 99.

A widow is entitled to the services of her infant son and may maintain an action for loss of services resulting from his injuries by the negligence of defendant without proof of actual services rendered by the son. Future contingent expenses can only be recovered by the child. *Kennedy v. N. Y. C. & H. R. R. Co.*, 35 Hun, 186, following *Gray v. Durland*, 50 Barb. 100; *Simpson v. Buck*, 5 Lans. 337; *Furman v. Van Sise*, 56 N. Y. 435.

In an action by a mother for loss of services of an infant child through injuries to the child, the mother must allege and prove that at the time of the accident she was entitled to the services of the child. *Geraghty v. New*, 7 Misc. Rep. 30, 57 St. Rep. 497, 27 N. Y. Supp. 403.

A parent, in an action for an assault upon his infant daughter, is entitled to recover for the loss of service or other actual losses only; but exemplary damages, by way of punishment for the aggravated assault, can be recovered only in an action by the infant. *Whitney v. Hitchcock*, 4 Den. 461.

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**ARTICLE II.****MARRIED WOMEN.**

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**SUBDIVISION 1.****Actions Between Husband and Wife.**

The common-law unity of husband and wife operates to preclude either spouse from maintaining an action for tort against the other. But the legal incapacity of the wife to be joined as a codefendant does not operate to exonerate a joint tortfeasor with the wife from an action by the husband, because joint tortfeasors may be proceeded against solely as well as jointly. *Kujek v. Goldmann*, 9 Misc. Rep. 34, 29 N. Y. Supp. 294, citing Dicey on Parties, chap. 16, rule 67; *Abbott v. Abbott*, 24 Am. Rep. 27.

In *Minier v. Minier*, 4 Lans. 421, it is said that the reasons for not allowing a wife to sue for a personal tort do not apply to an action concerning property. Thus she may sue her husband for the possession of real property wrongfully withheld. To the same effect see *Wright v. Wright*, 54 N. Y. 437.

A wife may sue her husband for conversion of household furniture, wearing apparel, and personal property. *Ryerson v. Ryerson*, 30 St. Rep. 375, 8 N. Y. Supp. 738.

A wife may sue her husband for converting money which is her separate estate. *Whitney v. Whitney*, 49 Barb. 319, 3 Abb. Pr. (N. S.) 350; *Wood v. Wood*, 18 Hun, 350.

A wife who has left her husband without good cause, and is living separate and apart from him, may maintain an action of replevin against him to recover possession of personal property belonging to her, which was left in and remained in his house and possession. *Howland v. Howland*, 20 Hun, 472, citing and discussing numerous authorities.

*Schultz v. Schultz*, 27 Hun, 26, holding that a married woman may maintain an action against her husband for assault and battery, was reversed in 89 N. Y. 644, without opinion.

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In 3 Silvernail's Annotations to General Laws, p. 2611, attention is called to the language of the court in *Bertles v. Nunan*, 92 N. Y. 150 (160), per Earl, J., as follows: "Although section 7 of the Act of 1860 authorizes a married woman to maintain an action against any person for an injury to her person or character, yet, we have held that she cannot maintain an action against her husband for such an injury." That writer considers this reference to be to the decision in 89 N. Y. 644, *supra*, reversing *Schultz v. Schultz*, 27 Hun, 26.

*Abbe v. Abbe*, 22 App. Div. 484, 48 N. Y. Supp. 25, holds the rule as last above stated upon authority of 89 N. Y. 644, *supra*. The like rule was held in *Longendyke v. Longendyke*, 44 Barb. 366; *Freethy v. Freethy*, 42 Barb. 641.

A criminal action against the husband for abandonment of the wife, under the Code of Criminal Procedure, §§ 899-913, is designed to protect the public against the burden of supporting the wife and children. It is not intended to give the wife any new remedy, directly or indirectly. *People ex rel. Douglass v. Naehr*, 30 Hun, 461.

Divorce does not enable the divorced wife to sue her husband for personal injury committed during coverture. Webb's Pollock on Torts, 65, citing *Phelps v. Barnett*, 1 Q. B. Div. 436, 45 L. J. Q. B. 277. See also *Abbott v. Abbott*, 67 Me. 304.

A husband may maintain an action for conversion against his wife to recover damages for the wrongful conversion of personal property taken by her from his possession after she has abandoned him. *Mason v. Mason*, 66 Hun, 386, 21 N. Y. Supp. 306; *Berdell v. Parkhurst*, 19 Hun, 358.

A husband cannot sue his wife to recover damages for deceit by which he was induced to marry her. But he may sue the person who joined with her in the deceit. *Kujek v. Goldmann*, 9 Misc. Rep. 34, 29 N. Y. Supp. 294, affirmed in 150 N. Y. 176.

SUBDIVISION 2.

Liability to Third Persons.

The reason of the common-law liability of the husband for the torts of his wife was the fact that on marriage he succeeded to all her personal estate which he might reduce to possession during coverture, and thus creditors having a right of action against the wife were deprived of the power to proceed

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against her because no judgment was permitted and nothing could have been realized. For this and other reasons it was necessary to make the husband liable for the torts of his wife, as otherwise the injured person might be completely without a remedy. Rodgers on Domestic Relations, § 242.

Section 450 of the Code provides substantially that a married woman both as plaintiff and defendant shall be regarded, as to actions for tort, as if she were single, and it is further provided that the husband is not a proper party in an action brought on account of the wrongful acts of his wife, committed without his instigation.

The present statute (§ 27, Domestic Relations Law) provides, "She is liable for her wrongful or tortious acts; her husband is not liable for such acts unless they were done by his actual coercion or instigation; and such coercion or instigation shall not be presumed, but must be proved."

This statute evidently changes the common-law presumption as to coercion, which is thus stated in Cooley on Torts, 132: "There is a presumption, however, corresponding to that which is made in criminal law that if the wrong is committed by the wife in the presence of her husband it must have been committed by his consent and under his influence, and consequently it is his wrong rather than that of the wife." It is evident that the statute aims directly at this presumption.

If a husband and wife join in malicious prosecution, she being the real active party as well as he, they may both be joined as defendants. *Cassin v. Delaney*, 38 N. Y. 178.

Where the action is joint the liability is joint. The husband and wife may be joint tort feors in assault. If the husband advises or directs a wrong, as entry upon another's premises by his wife, he is liable. Hale on Torts, 128, citing *Hayden v. Woods*, 16 Neb. 606, 20 N. W. 345; *Bauerschmetz v. Bailey*, 29 Ill. App. 295.

The wife may be held liable for the acts of her husband as her agent. Thus she can be held liable for the fraud of her husband dealing as her agent with her property. Hale on Torts, 129, citing *Rowe v. Smith*, 45 N. Y. 230; *Baum v. Mullen*, 47 N. Y. 577.

A trespass committed by the wife in the care and management of her separate estate is her independent personal tort, for which

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the husband is not liable. *Rowe v. Smith*, 45 N. Y. 230; *Baum v. Mullen*, 47 N. Y. 577; *Fitzgerald v. Quann*, 109 N. Y. 441; *Mangam v. Peck*, 111 N. Y. 401.

Where the husband and wife are domiciled on the premises which are the separate and exclusive property of the wife, the husband is not, in legal presumption, in control of the premises so as to make him responsible to one who enters on the premises of the wife for an injury sustained by the careless leaving of a pit uncovered. *Fiske v. Bailey*, 51 N. Y. 150.

Nor is a husband acting as his wife's agent in regard to lands liable for a continuing nuisance thereon. *People v. Crounse*, 51 Hun, 489, 21 St. Rep. 687, 4 N. Y. Supp. 266.

In *Valentine v. Cole*, 1 St. Rep. 719, the defendant, a married woman, owned the property on which she and her husband lived. Her husband owned and kept a dog, which bit the plaintiff. *Held*, that the wife, as owner of the premises, was liable for the injury. That since the Married Women's Acts the husband cannot lawfully interfere with his wife's possession of property, and is not liable for trespass of her cattle. She alone is liable for maintaining a nuisance to the injury of her neighbors. Her husband is not in possession solely or jointly with her.

In *Quilty v. Battie*, 135 N. Y. 201, the rights of married women under various statutes of this State are considered, and it was held that a trespass committed by the wife in the care and management of her separate estate is her independent personal tort, for which the husband is not liable, and in an action to recover damages therefor he is not a proper party.

SUBDIVISION 3.

Right of Action by Wife against Third Persons.

Domestic Relations Law (Laws 1896, chap. 272, § 27) provides that "A married woman has a right of action for an injury to her person, property, or character, or for an injury arising out of a marital relation, as if unmarried."

In *Filer v. New York Central R. R. Co.*, 49 N. Y. 47, the decision was that, unless the wife was actually engaged in some business or service in which she would, but for the injury, have earned something for her separate benefit, and which she had lost

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by reason of the injury, she had sustained no consequential damages.

In *Brooks v. Schwerin*, 54 N. Y. 343, it was held that when a married woman labors for another her services and earnings no longer belong to her husband but to herself, and so far as she is disabled from performing such services, she can recover for the loss.

In *Blaechinska v. Howard Mission*, 130 N. Y. 497, it was ruled that recovery could not be had by a married woman, in an action to recover damages for injuries sustained through defendant's negligence, for loss of her services in the discharge of household duties, and for other services rendered by her to her husband, and *Brooks v. Schwerin* was distinguished because in that case the wife worked for a stranger, while in this she worked for her husband.

These authorities are considered in *Texas & Pacific Ry. Co. v. Humble*, 181 U. S. 56 (66-67), and followed, the court holding that the fact that the plaintiff, a married woman, who had been engaged for years in business on her own account, was temporarily out of employment, did not prevent her from recovering for diminished capacity to labor under the authorities above cited.

"Presumptively, damages for negligently diminishing the earning capacity of a married woman belong to her husband, and, when she seeks to recover such damages, the complaint must contain an allegation that for some reason she is entitled to the fruits of her own labor; or, if she seeks to recover damages for an injury to her business, she must allege that she was engaged in business on her own account, and by reason of the injury was injured therein as specifically set forth." *Uransky v. D. D., E. B. & B. R. R. Co.*, 118 N. Y. 304 (308); *Kleiner v. Third Ave. R. R. Co.*, 162 N. Y. 193.

She is not entitled to recover in an action for personal injuries for loss of time which she devotes to household services, although not living with her husband, and earning her own living. *Thuringer v. N. Y. C. & H. R. R. R. Co.*, 71 Hun, 526, 55 St. Rep. 87, 24 N. Y. Supp. 1087.

She cannot maintain an action to recover compensation for the loss of her husband's support and companionship, resulting from injury to him caused by negligence. *Goldman v. Cohen*, 30 Misc. Rep. 336, 63 N. Y. Supp. 459.

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She may maintain an action, in her own name and for her own benefit, without joining her husband as party, against one who has enticed him from her, alienated his affections, and deprived her of his society. *Bennett v. Bennett*, 116 N. Y. 584.

## SUBDIVISION 4.

## Action by Husband for Injuries to the Wife.

A husband may maintain an action for loss which he has sustained by reason of a personal injury inflicted upon his wife. He may recover for the loss of his wife's society, or of her services, or both, and also the expenses necessarily incurred by him in consequence of the injury. *Buswell Law of Personal Injuries*, § 14.

Where the injury to the wife is such that the husband receives a separate loss or damage, as where he is put to expense or is deprived of the society or the services of his wife, he is entitled to recover therefor, and may bring a separate action in his own name. 15 Am. & Eng. Encyc. of Law (2d ed.), 861.

The services of the wife in the household in the discharge of her domestic duties still belong to the husband, and in rendering such service she still bears to him the common-law relation. So far as she is injured so as to be disabled to perform such service for her husband, the loss is his and not hers; and for such loss of service he, and not she, can recover of the wrongdoer. But when she labors for another, her service no longer belongs to her husband, and whatever she earns in such service belongs to her as if she were a *feme sole*, and, so far as she is disabled to perform such service by any injury to her person, she can in her own name recover a compensation against the wrongdoer for such disability as one of the consequences of the injury. *Brooks v. Schwerin*, 54 N. Y. 343 (348).

In *Uransky v. D. D., E. B., etc., R. R. Co.*, 118 N. Y. 304, it is said that presumptively damages for negligently diminishing the earning capacity of a married woman belong to her husband, and it is held that where she seeks to recover such damages, the complaint must allege that for some reason she is entitled to the fruits of her own labor or that she was engaged in business on her own account, and by reason of the injury was injured therein. See *Matter of Callister*, 153 N. Y. 294.



## Art. 3. Lunatics.

## ARTICLE III.

## LUNATICS.

A committee of a lunatic may maintain, in his own name, adding his official title, any action or special proceeding which the person, with respect to whom he is appointed, might have maintained, if the appointment had not been made. Code, § 2340.

Insanity is a disability affecting the statute of limitations. See Code, §§ 375, 392, 396.

A lunatic or idiot may be discharged from arrest as a privileged person in the discretion of the court. Code, § 554.

Cases requiring proof of fraud, malice, or negligence would, perhaps, create no difficulty where the defendant was a person so unsound of mind as not to be accountable to the criminal law; an action of tort could hardly be maintained. A madman may, indeed, be guilty of fraud or malice in some sense (cunning, it is well known, is a common trait of the insane), but not in the sense in which it would be necessary to create liability, as *e. g.*, in an action for deceit or for malicious prosecution. Bigelow on Torts (7th ed.), § 69.

Underhill on Torts (7th ed.), 50, it is said: "Every person who commits a tort not depending on fraud or malice, and not arising out of the performance of a contract, is liable to be sued, notwithstanding infancy, coverture, or unsoundness of mind."

In those cases where intent is immaterial there is abundant authority for saying that insanity constitutes no defense. Bishop, 507.

Speaking of the reasons against considering insane persons responsible for their torts, Cooley (2d ed., p. 116) says: "If his mental disorder makes him dependent, and at the same time prompts him to commit injuries, there seems to be no greater reason for imposing upon the neighbors or the public one set of these consequences rather than the other; no more propriety or justice in making others bear the losses resulting from his unreasoning fury when it is spent upon them or their property, than there would be in calling upon them to pay the expense of his confinement in an asylum when his own estate is ample for the purpose."

Speaking of other reasons for the rule imposing liability

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the last writer further says (p. 117): "Nothing could present to the depraved mind a stronger temptation to simulate insanity for purposes of mischief and revenge than a rule of law which would give full immunity in case the deception proved successful \* \* \* . But it does not follow that the responsibility of persons mentally incompetent should be coextensive in any respects with that of other persons. \* \* \* The aggravation of motive would consequently be wholly wanting. While, therefore, the sane person might justly be compelled to pay damages proportioned to the malignity of his motives, the insane person would make full reparation if he were required to meet the actual damages which the injured party had suffered in person or estate, leaving wholly out of view any aggravation which malice might have supplied."

Persons bereft entirely of reason — unconscious agents, lunatics, and very young children — are not responsible for their negligence, and cannot have contributory negligence imputed to them. Hale on Torts, 463.

If exemplary damages are sought on account of intent or malice of the defendant, insanity is a good answer to that claim, as an insane person has no will or malice, and the measure of damages is compensation for the actual loss. *Krom v. Schoonmaker*, 3 Barb. 647.

Authorities upon this point are collated in *Jewell v. Colby*, 66 N. H. 399; Erwin's Cases on Torts, 66.

In *Williams v. Hays*, 143 N. Y. 442, authorities as to liability of lunatics for torts are fully considered, and collated, resulting in the holding that an insane person is liable for his torts the same as one who is sane, except in those cases in which malice, and, therefore, intention is a necessary ingredient; and there is no distinction between torts of nonfeasance and of misfeasance, so that an insane person is liable for injuries caused by his tortious negligence and so far as this liability is concerned, is held to the same degree of care and diligence as a person of sound mind. On subsequent appeal in the same case, 157 N. Y. 541, the language of the court is considered and commented on at page 546, Haight, J., in the prevailing opinion, saying: "Whether a lunatic or a person mentally incapacitated should be held responsible in all instances for his nonfeasance or failure to act, we will not stop to consider."

## Art. 4. Drunkards.

**ARTICLE IV.****DRUNKARDS.**

Drunkenness is no excuse for a tort. It will be presumed that a man knows if he gets drunk he will be liable to commit acts which will be liable to produce injury to other people. Piggard on Torts, §§ 216, 217, cited Hale on Torts, 100.

That a tort was committed in a drunken state is no excuse. It is conceivable, however, that the fact might have influence on the award of damages, either to aggravate or mitigate them, according to the nature of the case and the circumstances. Cooley on Torts, 31.

Of the rule that drunkenness in general does not excuse crime, Bishop (512) says: "But in principle the same rule would seem to apply to torts, namely, that being drunk is not a general defense, but it may be available where the tort is of a particular sort requiring a special intent. \* \* \* Drunkenness has been adjudged to be no mitigation in an action for slander. \* \* \* On the other hand, the fact that one is drunk or a drunkard does not justify another in even negligently injuring him; and, if known to the other, it may call for special care arising from the particular danger. Intoxication, therefore, may be matter for the consideration of the jury."

Perhaps delirium tremens may be a defense, for it is a species of insanity, and like other insanity must affect responsibility of acts civilly and criminally. Hale, 100, citing *O'Brien v. People*, 48 Barb. 275.

In *Gates v. Meredith*, 7 Ind. 440, it was held that insanity, though caused by drunkenness, could preclude responsibility for what otherwise would be slander. "Slander must be malicious. An idiot or lunatic, no matter from what cause he became so, cannot be guilty of malice. He may indulge the anger of the brute, but not the malice of 'one who knows better.'"

Where one commits a fraud upon an intoxicated person, the presumption is against good faith. "Whoever takes advantage of a state of intoxication to deal with another must do so with the presumption against his good faith proportioned to the depth of mental obscurity caused by the condition; and the presumption is greatly strengthened if he himself has brought about or en-

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couraged the intoxication." Cooley, 604, citing *Peck v. Carey*, 27 N. Y. 9.

Intoxication *per se* does not establish contributory negligence. *Newton v. Central Vermont R. R. Co.*, 80 Hun, 491, 62 St. Rep. 387, 30 N. Y. Supp. 488, affirmed in 151 N. Y. 624.

An employee's drunkenness or habitual intemperance, if known to the employer, will in proper circumstances be treated as negligence in the latter. Bishop, 514, citing *Cleghorn v. New York Cent. R. R. Co.*, 56 N. Y. 44.

In *Monk v. Town of New Utrecht*, 104 N. Y. 552, an action against a town for negligence by commissioner of highways by reason of which plaintiff received injuries in falling down an embankment, it appears (opinion, p. 561), that the plaintiff was an inmate of an inebriate asylum and had left the asylum under a pledge that he would abstain from intoxicating drink during the day, and that he is described by every disinterested witness in the case as much intoxicated. This seems to have been regarded by the court rather as an additional reason why the plaintiff should have been nonsuited, as bearing on his contributory negligence, than by way of excuse, since judgment for nonsuit granted in the court below was affirmed.

ARTICLE V.

INNKEEPERS.

It is a well-settled rule, which has been in force from the earliest times, that every one who keeps a common inn is under a legal obligation to afford proper entertainment to all persons offering themselves as guests, unless he has a reason, good and sufficient in law, for not doing so. He is not bound to receive any who are not travelers or transients; or persons not in a fit condition to come to the inn, as where they are drunk, disorderly, or otherwise obnoxious, or are not able to pay the price of their entertainment. 16 Am. & Eng. Encyc. of Law, 524.

Although it has been sometimes considered that the liability of the innkeeper for loss or damage to the goods of guests depends upon the question of negligence, it is now more generally considered that the innkeeper's liability for failure to keep the goods of his guests safely arises independently of the question of negligence. The host is now held liable for damage to or loss of the

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goods put in his custody, though he exercise the greatest diligence in the care of them, unless the loss occurred by the guest's negligence, or by *vis major*, inevitable accident, or the act of God. Bigelow, p. 331.

If the goods of the guest have been received into the care and keeping of the innkeeper, the question of negligence of the defendant or his servants has nothing to do with the case. Nelson, Ch. J., in *Piper v. Manny*, 21 Wend. 282, citing 5 T. R. 275.

An innkeeper is an insurer of the safety of the property of his guest, brought *infra hospitium*. He is liable for its loss, whether by burglary, theft, fire, or negligence, unless it arises from the neglect or misconduct of the guest, the act of God, or the public enemies. His liability extends to wearing apparel, jewelry, money, and even to the horses, wheat, butter, and other articles of bulk belonging to the guest, if received by the innkeeper into his care and within his place of entertainment. This is the rule of the common law, enforced in the day of Lord Coke, and long prior, and ever since, as well in England as in this State. (*Hulett v. Swift*, 33 N. Y. 371, and numerous cases there referred to.) *Wilkins v. Earle*, 44 N. Y. 172 (178).

The principle upon which innkeepers are charged by the common law, as insurers of the money or personal effects of their guests, originated in public policy. It was deemed to be a sound and necessary rule that this class of persons should be subject to a high degree of responsibility in cases where an extraordinary confidence is necessarily reposed in them, and where great temptation to fraud and danger of felony exists by reason of the peculiar relations of the parties. *Adams v. N. J. Steamboat Co.*, 151 N. Y. 163, holding that the rigid rule of the common law between innkeeper and guest is applicable between a passenger steamboat company and passengers to whom it furnishes rooms and entertainment. That a distinction exists between the degree of responsibility resting upon the steamboat company for the personal effects of the passenger occupying a stateroom, and that resting upon a railroad company in respect to a passenger occupying a berth in a sleeping car.

Innkeepers are insurers of property of their guests notwithstanding chapter 421 of the Laws of 1855. The effect of that statute is to modify common-law liability, so that it does not extend to money, jewels, or ornaments not deposited in the safe

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provided for that purpose, where the innkeeper has complied with the provisions of the act on his part. *Wilkins v. Earl*, 44 N. Y. 172.

Under the provisions of chapter 658, Laws of 1855, exempting an innkeeper from liability from loss by fire of property of a guest in a barn or outbuilding, where it shall appear that the loss was the work of an incendiary, and occurred without negligence on his part, the burden is on the innkeeper to show the fire was an incendiary one, and to show absence of negligence on his part. *Faucett v. Nicolls*, 64 N. Y. 377.

Under provisions of chapter 421, Laws of 1855, with reference to deposit of moneys, jewels, ornaments, etc., in hotel safe, the statutory exemption applies to all moneys, jewels, and ornaments, and applies to every guest where the guest has the time and an opportunity to make the deposit. His omission to do so is a neglect within the meaning of the statute, although no carelessness or imprudence is shown. *Rosenplaenter v. Roessle*, 54 N. Y. 262, distinguishing *Bendetson v. French*, 46 N. Y. 266. See also *Hyatt v. Taylor*, 42 N. Y. 258.

In *Ramaley v. Leland*, 43 N. Y. 539, it was held that the exemption under the statute is limited to the particular species of property named, and being in derogation of the common law, cannot be extended in its application by doubtful construction.

In *Briggs v. Todd*, 28 Misc. Rep. 208, 59 N. Y. Supp. 23, provisions of chapter 305, Laws of 1897, are strictly construed, and articles which were not jewels or ornaments, are held not within the exemption, and the hotel-keeper is liable for their value.

*Barnett v. Walker*, 39 Misc. Rep. 323, holds that under the Laws of 1899, chap. 380, which gives the keeper of a hotel a lien on the baggage of the guest, the innkeeper acquired no lien on a sewing machine brought upon his premises by a boarder, the legal right to the title and possession being in another person.

In *Becker v. Warner*, 90 Hun, 187, 35 N. Y. Supp. 739, and *Bernstein v. Sweeney*, 33 N. Y. Super. 271, held that a watch is neither a jewel nor ornament within the meaning of the statute exempting hotel-keepers.

Personal notice to the guest is the equivalent of a written or printed notice required by statute. *Purvis v. Coleman*, 21 N. Y. 111. But such notice must either be brought home to the guest

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or the statute complied with to relieve the landlord from liability. Such liability is not limited to property of any particular kind or value, but embraces all the personal property of the guest brought into the inn. *Kellogg v. Sweeney*, 1 Lans. 397.

In *Becker v. Warner*, 90 Hun, 187, 35 N. Y. Supp. 739, it is said that negligence on the part of a guest in leaving his window on the ground floor of a city hotel open, and his property exposed, will defeat a recovery by him for its loss.

An innkeeper has power to waive the benefit of the statutory provisions relieving innkeepers from responsibility for the loss of money and jewels owned by guests and not deposited in the safe. *Friedman v. Breslin*, 51 App. Div. 268, 65 N. Y. Supp. 5, affirmed, 169 N. Y. 574.

In *Converse v. Walker*, 30 Hun, 596, appeal dismissed, 99 N. Y. 606, it was held, citing *Sweeney v. Old Colony & Newport R. R. Co.*, 10 Allen, 368; *Nicholson v. Erie Ry. Co.*, 41 N. Y. 525, that "no duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who go there solely for their own convenience or pleasure, and who are not either expressly invited to enter or induced to come upon the grounds for the purpose for which the premises are appropriated and occupied, by some preparation or adaptation of the place for use by customers or passengers which might naturally and reasonably lead them to suppose that they might properly and safely enter thereon," distinguishing *Camp v. Wood*, 76 N. Y. 92, which holds that an innkeeper by letting a hall for public purposes held out to the public that the hall was safe, and was bound to exercise care to provide safe arrangements for the entrance and departure of people who came there upon his invitation.

An innkeeper is not bound as such to furnish accommodations to enable a person to carry on trade or business; and, where he does so, as to property brought upon his premises for the purposes of such trade or business, the utmost limit of his liability is that of bailee for hire. *Mowers v. Fethers*, 61 N. Y. 34.

An innkeeper is liable to a person who having taken his money to a room which he occupies with a disreputable woman, afterward when she has gone comes down stairs, asks a clerk to keep his money, and, upon the refusal of the clerk to do so, returns with it to his room, from which it is stolen during subsequent

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occupation. *Lucia v. Omel*, 46 App. Div. 200, 61 N. Y. Supp. 659.

To enforce the strict common-law liability of an inn-keeper the technical relation of guest and innkeeper must be established. In *Hancock v. Rand*, 94 N. Y. 1, very full consideration is had of the question as to what facts justify a finding that the relation is that of innkeeper and guest.

ARTICLE VI.

CARRIERS.

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SUBDIVISION 1.

Liability of Carriers Generally Considered.

At common law and under the authorities in this country and England there is a plain distinction between the liability of carriers of goods and of passengers. The duty of a carrier of goods is said to be independent of contract, and he is regarded as an insurer. The liability of a carrier of passengers arises out of a duty implied by law, but he does not warrant safety to passengers at all events, but only so far as human care and foresight can reasonably be required of him. While carriers of goods are insurers against all casualties, except those which arise from the act of God, the public enemy, the fault of the shipper, or the inherent quality of the property in itself. Ray on Imposed Duties (freight carriers), § 2; (passenger carriers), §§ 3, 4.

A carrier of passengers is not as to the passenger a bailee. In this respect the law of passengers is not a part of the subject of bailments. Those who hold themselves out as engaged in the business of carrying passengers for hire are regarded as undertaking a public duty. They are classed as carriers; moreover, public carriers of passengers are deemed common carriers as to the baggage received by them for transportation, as part of the business of transporting passengers. 6 Cyc. of Law and Procedure, 364.



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A carrier of goods is to be distinguished from a carrier of passengers not only as to the extent of his liability but from the nature of his contract. The liability of a carrier of goods arises out of the contract. The liability of a carrier for injuries to passengers depends upon his negligence, which is said to arise out of a public duty to carry safely which is imposed by law. In case of a carrier of passengers, who also carries the baggage of the passenger, the liability of the carrier for injury to the passenger depends upon his negligence; for injury to goods he is liable for all injuries not caused by the act of God or the public enemy. 5 Am. & Eng. Encyc. of Law (2d ed.), 480.

The common carrier, whether by land or water, is held responsible to the owner for all loss and damage of the property intrusted to his care, whether it arises from his own negligence or that of his servants, or of third persons; or whether it be done by the tortious acts of himself or of others, who are not the public enemies; or whether it be by unavoidable accident, not caused by the immediate act of God. Against all such losses the carrier is an insurer, and he must make them good, whatever may be their extent; and it is no answer to the claim of the owner, that he has done the best he could. 2 Wait's Actions and Defenses, 24, citing *Orange County Bank v. Brown*, 9 Wend. 85; *Kiff v. Old Colony, etc., Ry. Co.*, 117 Mass. 591; *Railroad Co. v. Reeves*, 10 Wall. 176, 189.

The reason for the distinction between carriers of persons and carriers of goods has been said to be that the passengers are capable of taking care of themselves and of exercising vigilance and foresight, which the owners of goods who have intrusted them to others cannot do. The carrier of passengers is required to take every possible precaution against danger, and to use the utmost care which is consistent with the nature and extent of the business in which he is engaged. Wait's Actions and Defenses, 63, citing *Ingalls v. Bills*, 9 Metc. 1; *Simmons v. New Bedford Steamboat Co.*, 97 Mass. 361.

Bishop says (§ 74), that because a common carrier, whether of goods or of passengers, is a sort of public servant, the law imposes its duties upon him, the breach whereof is a tort even though there is also a contract which is violated by the same act.

In *Hannibal Railroad v. Swift*, 12 Wall. 262, it is said that the obligations and liabilities of a common carrier are not dependent

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upon contract, though they may be modified and limited by contract. They are imposed by the law from the public nature of the employment.

The refusal of a common carrier to accept a passenger must be; and the wrongful eviction of a passenger with or without unnecessary force may be, the subject of an action in tort rather than on contract. *Shearman & Redfield*, § 486.

The liability of a common carrier for the nondelivery of goods intrusted him for carriage may be enforced by an action in either of the forms formerly known as assumpsit or tort at the option of the pleader. *Catlin v. Adirondack Co.* (Court of Appeals, 1880), 11 Abb. N. C. 377, reversing 20 Hun, 19.

The gravamen of the action for injury to a passenger is the breach of the duty imposed by law upon the carrier of passengers, to carry safely, so far as human skill and foresight can go, all persons it undertakes to carry. This duty exists independently of contract, although there is no duty in a legal sense between the parties. The law raises the duty out of regard for human life, and for the purpose of securing the utmost vigilance by carriers in protecting those who have committed themselves to their hands. *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126 (134), citing *Bretherton v. Wood*, 3 Brod. & Bing. 54.

SUBDIVISION 2.

Carrier of Goods.

A common carrier is one who, by virtue of his calling, undertakes, for compensation, to transport personal property from one place to another for all such as may choose to employ him, and every one who undertakes to carry for compensation the goods of all persons indifferently is, as to liability, to be deemed a common carrier. *Jackson Iron Works v. Hurlburt*, 158 N. Y. 34 (38).

A common carrier of property is responsible for all loss or damage except that which is caused by the act of God or the public enemy. *Elliott v. Rossell*, 10 Johns. 1; *Kemp v. Coughtry*, 11 Johns. 107; *Ladue v. Griffeth*, 25 N. Y. 364; *Merritt v. Earle*, 29 N. Y. 115.

By the act of God is meant something which operates without any aid or interference from man. When the loss is occasioned,

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or is the result in any degree of human aid or interference, the case does not fall within the exceptions of the carrier's liability. *Merritt v. Earle*, 29 N. Y. 115.

The liability of a common carrier, as such, begins when goods are delivered to him, at the place appointed or provided for their reception, in a fit and proper condition and ready for immediate transportation. \* \* \* It is the duty of a railroad company to load freight delivered to it for transportation into its cars, and it is held that it may not devolve this duty, by any regulation, upon the shipper, and it cannot legally, as a condition of transportation generally, exact from the shipper a contract to place the freight upon its cars. *L. & L. F. Ins. Co. v. R., W. & O. R. R. Co.*, 144 N. Y. 200.

As a general rule, when goods are delivered to a carrier for transportation, and before the goods are shipped, a bill of lading or receipt is delivered by him to the shipper; the latter is bound to examine it and ascertain its contents, and if he accepts it without objection, he is bound by its terms; he cannot set up ignorance of its contents, and resort cannot be had to prior parol negotiations to vary them. To take a case out of this general rule, it must appear that before the delivery of the bill of lading the goods have been shipped, so that the shipper could not have reclaimed them had he objected to the contents of the bill of lading. *Germania Fire Ins. Co. v. Memphis & Charleston R. R. Co.*, 72 N. Y. 90; *Guillaume v. General Transportation Co.*, 100 N. Y. 491 (498).

In the absence of evidence to the contrary, it is to be assumed that goods accepted by a carrier for transportation are taken under the responsibility cast upon the carrier by the common law, save as modified by the statute. If the goods are lost under circumstances which render the carrier liable by the general rule of law, he must respond unless he can show that there was a special acceptance, equivalent to a contract, which exempts him from the ordinary liability of common carriers in the particular case. *Park v. Preston*, 108 N. Y. 434.

Limitation of the common-law liability of the carrier is dependent upon language in the contract fairly requiring such construction without the aid of implication. The provisions to the effect that the defendant would not be responsible for delay in the transit of the property did not have the effect to relieve it from

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the consequences of delay occasioned by its negligence, as exemption from liability for that cause was not expressed in the contract. *Jennings et al. v. Grand Trunk Ry. Co.*, 127 N. Y. 438 (450).

In *Will v. Postal Telegraph Cable Co.*, 3 App. Div. 22, the court, in commenting upon the authorities upon the subject, said that it is now well-settled rule of law, that the common-law liability of a carrier may be restricted by express stipulation, but that the tendency of the courts is very properly in the direction of its restriction rather than expansion, citing *Nicholas v. N. Y. C., etc., R. R. Co.*, 89 N. Y. 370.

Generally, words in the contract of a common carrier limiting its responsibility will not be construed as exempting it from liability for negligence, when they are capable of other construction. The rule applies both to carriers of persons and goods. *Kenny v. N. Y. C., etc., R. R. Co.*, 125 N. Y. 422.

It is the law of this State, as settled by many decisions in the Court of Appeals, that a common carrier may limit his liability by contract, and the contract may provide for immunity in the negligence of the carrier or one of the agents, but where the latter object is sought to be accomplished, the contract must be aptly expressed in unequivocal terms. *Zimmer v. N. Y. C., etc., R. R. Co.*, 137 N. Y. 460.

In *Springer v. Westcott*, 166 N. Y. 117, it was held that where a baggage express company, upon receiving a railroad passenger's check, delivered a paper which contained conditions relating to the terms of the contract, the court properly charged that if the plaintiff knew the character of the paper, or accepted it with notice of its contents, or with notice that it contained the terms of a special contract, she could not recover in excess of the amount stipulated therein; but if she did not know that the paper delivered was a contract, and received it not knowing its contents, and was satisfied it was given her simply to enable her to trace her property, or as a mere receipt, she could recover the value of the goods lost.

It seems that where plaintiff receives a written contract with reference to a shipment of freight before the shipment, he will be held to its terms; but the mere retention of such a contract, without examination, after such shipment, is not sufficient to preclude him from showing what the contract really was. *Waldron v. Fargo*, 170 N. Y. 130.

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In *Mills v. Weir*, 82 App. Div. 396, the authorities with regard to acceptance of receipt of an express company by shipper are collated and considered. It is held that where the shipper did not testify that he did not read the receipt, that the terms of the receipt were binding upon him, constituted the measure of the express company's obligation to him. Distinguishing *Blossom v. Dodd*, 43 N. Y. 264; *Maddan v. Sherard*, 73 N. Y. 329; *Springer v. Westcott*, 166 N. Y. 117, following *Kirkland v. Dinsmore*, 62 N. Y. 171, citing the language of Andrews, J., in that case that the acceptance by the shipper on the delivery of goods for transportation to the carrier, of the receipt or bill of lading, signed by the carrier, expressing the terms and conditions upon which they are to be received and are to be carried, constitutes in the absence of tort or imposition a contract controlling the rights of the parties.

When goods are actually delivered at the place of destination, and the complaint is only of late delivery, the question is simply one of reasonable diligence, and accident or misfortune will excuse the carrier, unless he expressly contracted to deliver within limited time. *Wibert v. N. Y. & Erie R. R. Co.*, 12 N. Y. 245; *Geismar v. Lake Shore & M. S. R. R. Co.*, 102 N. Y. 563.

The fact that damage was caused solely by the willful refusal of the carrier's servants to do their duty is no defense. *Blackstock v. N. Y. & Erie R. R. Co.*, 20 N. Y. 48.

It may, however, excuse delay in the delivery of goods by accident or misfortune, inevitable, or produced by the act of God. All that can be required in an emergency is that the carrier shall exercise due care and diligence, guard against delay, and forward the goods to their destination. *Geismar v. Lake Shore & Michigan Southern R. R. Co.*, 102 N. Y. 563, distinguishing *Blackstock v. N. Y. & Erie R. R. Co.*, 20 N. Y. 48, citing *Wibert v. N. Y. & Erie R. R. Co.*, 12 N. Y. 245, and holding that where a railroad company was prevented from carrying goods by mob violence, which it could not by reasonable efforts overcome, the delay in delivery was excused. *Tierney v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 306, is not referred to in the briefs of counsel nor in the opinion of the court.

The carrier's undertaking to transport goods necessarily includes the duty of delivering them safely, and he has not performed his duty until he has delivered them, or offered so to do,

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to the consignee. When the consignee is unknown the carrier is bound to make due effort to find and notify him. *De Mott v. Laraway*, 14 Wend. 225; *Sherman v. Hudson River R. R. Co.*, 64 N. Y. 254.

If the consignee is present upon the arrival of the goods, it is his duty to take them without unreasonable delay. If he is not present but lives at or in the vicinity of the place of delivery, the carrier must notify him of the arrival of the goods and then he has a reasonable time to remove them. If he is absent or unknown and cannot be found, the carrier may place the goods in its freighthouse and if the consignee does not call for them in a reasonable time, its liability as a common carrier ceases. *Fenner v. Buffalo & State Line R. R. Co.*, 44 N. Y. 505; *Draper v. President, etc., D. & H. C. Co.*, 118 N. Y. 118; *Scheu v. Benedict*, 116 N. Y. 510.

The liability of a carrier in the absence of special contract or proven custom makes him an insurer until delivery, or what is tantamount to delivery, and continues until either the property is actually delivered at its destination, or notice is given to the consignee and the expiration of a reasonable time for its removal. *McKinney v. Jewett*, 90 N. Y. 267; *Faulkner v. Hart*, 82 N. Y. 413.

A carrier is exonerated even as against a consignee of the goods, when such consignee is the owner, by delivering to a stranger pursuant to the direction of the consignee. *Bank of Commerce v. Bissell*, 72 N. Y. 615.

Express companies must make personal delivery or show excuse. They are not like carriers by vessels and railroads exonerated by transporting the goods to their dock or station nearest to the consignee's residence, and notifying him of their readiness to deliver. *Witbeck v. Holland*, 45 N. Y. 13.

A carrier discharges his duty as such when he consigns the goods to the consignee, and on refusal to accept them, the subsequent liability is that of the warehouseman. *Manhattan Rubber Shoe Co. v. Chicago & Burlington R. R. Co.*, 9 App. Div. 172, 41 N. Y. Supp. 83.

A warehouseman is only responsible for ordinary care and for loss or injury resulting from his own default or negligence. *Ludue v. Griffith*, 25 N. Y. 364.

In cases of transportation of goods over several railroads, con-

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stituting a continuous line, none of the roads may be said to be agents of the owner so as to make him responsible for their negligence, but each road is responsible for its own negligence only. *Sherman v. Hudson River R. R. Co.*, 64 N. Y. 254.

## SUBDIVISION 3.

## Carrier of Animals.

The liability of a common carrier of animals is not in all respects the same as that of the carrier of inanimate property. Though a carrier who undertakes to transport animals is not an insurer against injuries arising from their nature and propensities, and which diligent care cannot prevent, such as fright, refusal to eat, etc., yet laying out of view cases of inevitable accident, he is liable in the absence of special agreement, unless the damage was caused by an occurrence incident to the carriage of animals in a railroad car, and which defendants could not, in the exercise of diligence and care, have prevented. *Clarke v. Rochester & Syracuse R. R. Co.*, 14 N. Y. 570.

While common carriers are insurers of inanimate property against all loss and damage, except such as is inevitable or caused by public enemies, they are not insurers of animals against injuries arising from their nature and propensities, and which could not be prevented by foresight, vigilance, and care. *Penn v. Buffalo & Erie R. R. Co.*, 49 N. Y. 204; *Mynard v. Syracuse, B. & N. Y. R. R. Co.*, 71 N. Y. 180; *Waldron v. Fargo*, 170 N. Y. 130 (138).

## SUBDIVISION 4.

## Carrier of Passengers.

A carrier has no right to receive as a passenger, or to accept one who so demeans himself as to injure the safety or interfere with the reasonable convenience and comfort of other passengers; and this police power the person in charge is bound to exercise with all the means at his command, when occasion requires. *Putnam v. Broadway & Seventh Ave. R. R. Co.*, 55 N. Y. 108, cited and followed in *Freedon v. N. Y. C. & H. R. R. Co.*, 24 App. Div. 306, 48 N. Y. Supp. 584, holding that a carrier has a right to refuse to allow a person, not in possession of a ticket, who is so far intoxicated as to be helpless and almost unconscious, to enter its passenger car.

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A carrier of passengers is not required to accept all persons who offer themselves for transportation and tender fare; he may lawfully decline to receive or carry those who refuse to conform to reasonable rules, after knowledge of the same, or may after such refusal eject those who have been received. *Pease v. Delaware, Lackawanna, etc., R. R. Co.*, 101 N. Y. 367, followed in *Montgomery v. Buffalo Ry. Co.*, 165 N. Y. 139; the latter case citing also *Hibbard v. N. Y. & Erie R. R. Co.*, 15 N. Y. 455; *Barker v. Central Park, etc., R. R. Co.*, 151 N. Y. 237.

A regulation that passengers exhibit their tickets whenever requested by the conductor, is a reasonable and proper one. *Hibbard v. N. Y. & Erie R. R. Co.*, 15 N. Y. 455.

It is a reasonable regulation for a railroad company to make that a car shall be set apart for women traveling alone or with male relatives or friends, and it has a right to enforce such a rule. *Peck v. N. Y. C. & H. R. R. Co.*, 70 N. Y. 587.

The responsibility and duty of the carrier continues until the passenger reaches his destination. *Dwinelle v. N. Y. C., etc., R. R. Co.*, 120 N. Y. 117.

In *Elmore v. Sands*, 54 N. Y. 512, it was held that a limitation on a railroad ticket that it "shall be good this day only," is reasonable and valid.

In *Hill v. Syr., Bing. & N. Y. R. R. Co.*, 63 N. Y. 101, it was held that this regulation was not waived by the indorsement of a conductor upon the ticket.

In *Thorpe v. N. Y. C., etc., Co.*, 76 N. Y. 402, it was held that where seats in the ordinary cars were occupied either by passengers or their luggage, and a number of passengers were standing, and it appeared that the seats occupied by baggage would not have been sufficient for the standing passengers, it was not the duty of a passenger to ask the train conductor for a seat before passing into the drawing-room car; and that he was not a wrongdoer in passing into the drawing-room car and taking a seat until seats in the other cars should be vacated. That it was the duty of the defendant to furnish him a seat.

For unlawful expulsion of a passenger, if it was committed by a conductor within the instructions of the company, but unjustifiable as to the manner, the carrier is liable for any circumstances of aggravation, excessive violence, etc., which attended it. *Sanford v. Eighth Ave. R. R. Co.*, 23 N. Y. 343.



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But so much force may be used as is considered needful to effect the result. *Peck v. N. Y. C., etc., Co.*, 70 N. Y. 587.

A carrier of passengers by rail is bound to exercise the utmost vigilance, not only in guarding its passengers against careless interference by others, but even against violence, and if, in consequence of neglecting this duty, a passenger receives injury which, in view of all the circumstances, might have been reasonably anticipated, it is liable. *Carpenter v. B. & A. R. R. Co.*, 97 N. Y. 494.

While a railroad company is not an insurer of the safety of its passengers, it is bound to use a high degree of skill and vigilance to guard against accidents which may be attended with injurious consequences to them. This duty is not discharged without the utmost care and diligence which human prudence and foresight will suggest to secure the safety of the passenger, and this vigilance is to be exercised by the company to see that its roads and appliances used in operating it are and remain in good condition and free from defects, and a latent defect which will relieve it from responsibility is such only as no reasonable degree of human skill and foresight could guard against. *Palmer v. D. & H. C. Co.*, 120 N. Y. 170. See *Stierle v. Union Ry. Co.*, 156 N. Y. 70, and opinion on reargument, 156 N. Y. 684.

*Willis v. Metropolitan Street R. R. Co.*, 76 App. Div. 340, upon a review of the leading authorities, holds that the rule is well settled that once the relation of carrier and passenger is entered upon, the carrier is answerable for all consequences to the passenger of the willful misconduct or negligence of the persons employed by it in the execution of the contract which it has undertaken toward the passenger, distinguishing *Block v. Third Ave. R. R. Co.*, 60 App. Div. 191, 69 N. Y. Supp. 1107, and further holding that the weight of authority is that a passenger upon the cars of a common carrier is entitled to be safely transported, and that any act on the part of the defendant's servants in carrying out this contract, whether carelessly done, or done with personal malice on the part of the servant, which results in injury to the plaintiff, must charge the carrier with liability, and that a cause of action, whether for the assault or for negligence, is properly maintainable against the carrier. See *Dwinelle v. N. Y. C. & H. R. R. Co.*, 120 N. Y. 117.

But a railroad may contract with a gratuitous passenger for its

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exemption from liability, in all cases where it is not against law or public policy. *Wells v. N. Y. C. & H. R. R. R. Co.*, 24 N. Y. 181; *Perkins v. N. Y. C. & H. R. R. R. Co.*, 24 N. Y. 196.

The language of a ticket or pass must be explicit to relieve a railroad company from its common-law liability as a common carrier for personal injuries sustained by a passenger. Such a limitation must be expressed in language so plain and unequivocal that it can readily be apprehended by any one, whether it seeks to relieve the liability of the carrier of freight or passengers for its negligent acts. *Dow v. Syracuse, Lake Side & B. R. R. Co.*, 81 App. Div. 362, collating and citing authorities.

The liability of passenger carriers is based upon the law of negligence and can only receive full consideration in connection with treatment of that branch of the law. No attempt is made to do other than cite a very few of the leading authorities bearing upon the question of liability of carriers.

SUBDIVISION 5.

Carrier of Baggage.

A carrier of passengers by the sale of a passenger ticket without any specific agreement or separate compensation as incident to the contract, becomes obligated to carry the baggage of a passenger to a reasonable amount, and to deliver it at the end of the route to the passenger or his duly-authorized agent. *Isaacson v. N. Y. C. & H. R. R. R. Co.*, 94 N. Y. 278.

A common carrier is liable for the personal baggage of the passenger, unless the loss is caused by an act of God, or the public enemy, and a reasonable sum of money for the payment of his expenses, if carried by the passenger in his trunk, would be included in the liability for loss of baggage. *Adams v. New Jersey Steamboat Co.*, 151 N. Y. 163 (167).

A distinction exists between the degree of responsibility resting upon a steamboat company for the personal effects of a passenger occupying a stateroom, and that resting upon a railroad company in respect to a passenger occupying a berth in a sleeping car. *Adams v. N. J. Steamboat Co.*, 151 N. Y. 163.

The nature and extent of liability of a carrier for the baggage of the passenger is very fully considered and authorities cited in *Talcott v. Wabash R. R. Co.*, 159 N. Y. 461; *Trimble v. N. Y. C. & H. R. R. R. Co.*, 162 N. Y. 84.

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## ARTICLE VII.

## MASTER AND SERVANT.

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## SUBDIVISION 1.

## Rule Respondent Superior.

It is a familiar and primary rule of law that a man is not responsible for the acts of others. To this rule there is, however, an exception, known as *respondent superior*, so thoroughly established that it is considered rather as a fundamental rule than as an exception, that the master is liable for the wrongful acts and negligence of his servant, performed while in the pursuit of his master's business within the scope of his employment. 12 Am. & Eng. Encyc. of Law (2d ed.), 897.

It is an old and thoroughly established doctrine that, where the relation of master and servant exists, the master is responsible to third persons for the damage caused by the wrongful acts or omissions of his servants in the course of their employment as such. Shearman & Redfield, § 141; *Harlow v. Humiston*, 6 Cow. 189, holding that if a man's servant in ordinary course of his business obstructs a highway, from which a traveler receives a subsequent injury, the master is liable. This is known as the doctrine of *respondent superior*. McKinney on Fellow Servants, § 2.

The explanation of the doctrine seems to be historical, dating back to the period of the Roman law, when servants were slaves, for whom the father of the family was responsible as part of his general responsibility for the family, which he represented and governed. 2 Kent Comm. 260, note.

The liability of the master to third persons for the negligent or wrongful acts of those in his employment is based on the broad principle of the general security of society and business. As

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every one is responsible for the results of his own negligence, a person may not divest himself of liability by deputizing another to act for him, and then disclaiming the consequence of his acts, if they result in injury to the person, property, or reputation of another. In an early case, Parke, B., was of the opinion that he was properly held liable "who selected him as his servant, from the knowledge of, or belief in, his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey." Barrows on Neg. 153, citing *Quarman v. Burnett*, 6 M. & W. 499; *Hern v. Nichols*, 1 Salk. 289; *Lane v. Cotton*, 12 Mod. 473.

The reason of the rule is that every act which is done by a servant in the course of his duty is regarded as done by the master's orders, and consequently is the same as if it were the master's own act. *Barton's Hill Coal Co. v. McGuire*, 3 Macq. H. L. 306.

The rule *respondeat superior* is based upon the right which the employer has to select his servants, and discharge them if not competent or skillful or well-behaved, and to direct and control them while in his employ. The rule has no application to a case where this power does not exist. *Maximilian v. The Mayor*, 62 N. Y. 160.

It is the general rule that a party injured by the negligence of another must seek his remedy against the person whose actual negligence it was which caused the injury, and that such person alone is liable. (*King v. N. Y. C., etc., Co.*, 66 N. Y. 182.) The case of master and servant is an exception, and the negligence of the latter is imputable to the master where the servant, in doing the act which occasions the injury, is acting within the scope of his employment. This exception rests upon most satisfactory reason, because the servant in the case supposed is acting in place of the master and by his appointment, and the master who selects and controls the servant makes the servant his representative in his business. *Engel v. Eureka Club*, 137 N. Y. 100 (103).

Allen, J., in *Mott v. Consumers' Ice Co.*, 73 N. Y. 543, says: "The responsibility of the master for the acts of a servant rests upon the express or implied authorization of the acts by the master, who in the employment of another to act for him assumes all the risk of a wrongful execution of his duties."

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## SUBDIVISION 2.

## When Relation of Master and Servant Exists.

"The master is one who has the superior choice, control, and direction; whose will is represented, not merely in the ultimate result of the work in hand, but in all its details; one who is the responsible head of a given industry; one who has the power to discharge; one who has in his employment one or more persons hired by contract to serve him, either as domestic or common laborers; one who not only prescribes the end, but directs, or may at any time direct, the means and methods of doing the work; a head or chief, an instructor, an employer; a director, a governor. A servant is one who is employed to render personal service to his employer otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter." 14 Am. & Eng. Encyc. of Law (1st ed.), p. 745, citing elementary works and authorities.

A person who puts another in his place to do a class of acts in his absence is answerable for the torts of the latter, either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done, and whether it be done negligently, wantonly, or even willfully; provided that which is done is done by the agent in the course and within the general scope of his employment. But if the agent without regard to his service or his duty therein, or solely to accomplish some purpose of his own, acts maliciously or wantonly, the employer is not liable. Underhill, 59, citing *Bayley v. Manchester, Sheff. & Lincoln R. R. Co.*, L. R.; 7 C. P. 415; *Dyer v. Munday* (1895), 1 Q. B. 742; *Mott v. Consumers' Ice Co.*, 73 N. Y. 543.

The doctrine *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of the wrong at the time and in respect to the very transaction out of which the injury arose. The master is the person in whose business the servant is engaged at the time, and who has the right to control and direct his conduct. *Higgins v. Western Union Telegraph Co.*, 156 N. Y. 74 (78), citing *Wyllie v. Palmer*, 137 N. Y. 248 (257).

These authorities, with others, are collated and discussed in *Murray v. Dwight*, 161 N. Y. 301, where it is held that the mere

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fact that one renders some service to another for compensation, express or implied, does not necessarily create the legal relation of master and servant. A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling. Cited in *Hallett v. N. Y. C., etc., R. R. Co.*, 167 N. Y. 543 (546).

In order to establish the liability of one person, for injuries caused by the negligence of another, it is not enough to show that the latter was at the time acting in the employment of another to infer that such employment created a relation of master and servant. *Lewis v. Long Island R. R. Co.*, 162 N. Y. 52 (66).

He is deemed a master who has the supreme choice, control, and direction of the servant, and whose will the servant represents, not only in the ultimate result of his work, but in its details. While he is a contractor who renders service in the course of an independent occupation representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. *Stevens v. Armstrong & Squires*, 6 N. Y. 435; *Kelly v. Mayor*, 11 N. Y. 432.

One may be employed without being a servant and have an employer who is not a master. The relation exists where the employer selects the workman, may remove or discharge him for misconduct and may order not only what work shall be done but the mode and manner of performance. *Butler v. Townsend*, 126 N. Y. 105; *King v. N. Y. C., etc., Co.*, 66 N. Y. 181.

A person is not chargeable with the negligent acts of another in doing work upon his lands, unless he stands in the character of employer to the one guilty of negligence, or unless the work, as authorized by him, would necessarily produce the injuries complained of, or they are occasioned by the omission of some duty incumbent upon him. *McCafferty v. S. D. & P. M. R. R. Co.*, 61 N. Y. 178, cited and followed in *Sullivan v. Dunham*, 161 N. Y. 290 (298).

An interesting discussion is had in *Howard v. Ludwick*, 171 N. Y. 507, in prevailing opinion, Haight, J., and dissenting opinion, Parker, Ch. J., as to when the question should be sent to the jury whether the relation of master and servant exists in a given case. The majority opinion holds that a question of fact arose and was properly submitted to the jury. The dissenting

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opinion, concurred in by Gray and O'Brien, JJ., holds that the matter should have been disposed of as question of law upon the authority of *Murray v. Dwight*, 161 N. Y. 301; *Wyllie v. Palmer*, 137 N. Y. 248; *McInerney v. D. & H. C. Co.*, 151 N. Y. 411; *Higgins v. W. U. Telegraph Co.*, 156 N. Y. 75.

## SUBDIVISION 3.

## Liability for Acts of Independent Contractor.

An independent contractor is one who undertakes to produce a given result without being in any way controlled as to the method by which he attains that result. He is distinguished from a servant, who, on the other hand, is under the orders and control of his master in respect to the means and methods used to attain the end for which he is employed. Hale, 133.

Fraser (on Torts, p. 30) defines the distinction between an independent contractor and servant as follows: "An independent contractor is one who undertakes to produce a given result without being in any way controlled as to the method by which he attains that result. A servant, on the other hand, is under the order and control of his master in respect to the means and method to be used to attain the thing for which he is employed. Citing *Sadler v. Henlock* (1855), 4 E. & B. 570 (578); *Donovan v. Laing* (1893), 1 Q. B. 629.

The relation of contractor does not exist, but rather that of master and servant, when the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished; or, in other words, not only what shall be done, but how it shall be done. *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, citing *Railroad Co. v. Hanning*, 15 Wall. 649 (656).

Where a person contracts with another to do a lawful thing, retaining no supervision or control over the manner of carrying out the contract, he is not liable for the negligence of the contractor in doing such thing. *Blake v. Ferris*, 5 N. Y. 48.

An independent contractor is defined in *People v. Orange County Roads Construction Co.*, 175 N. Y. 84 (90), as one who contracts to perform the work at his own risk and gets the workmen for his servants, and he, not the State or corporation with whom he contracts, being liable for their misconduct.

Mechanics employed to do repairs in their own way by their

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own servants, without stipulated price for their work, are to be considered as contractors for whose negligence in carrying out the lawful contract the other party is not responsible. *Hexamer v. Webb*, 101 N. Y. 377.

An employer is not liable for acts of a contractor or subcontractor. *Slater v. Mesereau*, 64 N. Y. 138; *King v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 181; *Engel v. Eureka Club*, 137 N. Y. 100.

"The rule that where the relation of master and servant, or principal and agent, does not exist, but an injury results from negligence in the performance of work by a contractor, the party with whom he contracts is not responsible for his negligence or that of his servants, is well established by the authorities in this State." Erwin on Torts, 38, citing *Blake v. Ferris*, 5 N. Y. 48; *Pack v. Mayor*, 8 N. Y. 222; *Kelly v. Mayor*, 11 N. Y. 432; *McCafferty v. S. D. & P. M. R. R. Co.*, 61 N. Y. 178; *King v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 181; *Town of Pierrepont v. Loveless*, 72 N. Y. 211; *Ferguson v. Hubbell*, 97 N. Y. 507; *Herrington v. Village of Lansingburgh*, 110 N. Y. 145; *Roemer v. Striker*, 142 N. Y. 134.

That the master is not liable for the unauthorized act of a contractor where he did not advise or direct the act, or authorize the commission of the trespass. *Ketchum v. Newman*, 141 N. Y. 205.

Where the performance of work contracted for was neither dangerous, nor extraordinary, the master was held not to be liable for negligent performance by the contractor. *Negus v. Becker*, 143 N. Y. 303 (310).

The liability of an owner for default of a contractor engaged in the exercise of an independent calling is very fully considered in *Burke v. Ireland*, 166 N. Y. 305, where the defendant undertook to erect a building on his own land in the proper and usual way, omitting nothing by reason of which he could be charged with personal negligence, and taking such measures as a reasonably prudent man would do. An accident occurred which could not reasonably be anticipated or guarded against except by the experts employed to plan and erect the building. Held, that the defendant could not, within acknowledged principles of law, be held liable. This case is cited in *Cochran v. Sess*, 168 N. Y. 372, upon the question of the liability of a contractor to the employee of another contractor who sustains injuries by reason of an insecure



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or defective foundation furnished by the owner of the building in which the accident occurred.

The contractor is not liable for default of a subcontractor. *Devlin v. Smith*, 89 N. Y. 470.

There are well-understood exceptions to this rule of exemption. Cases of statutory duty imposed upon individuals or corporations; of contracts which are unlawful, or which provide for the doing of acts which when performed will create a nuisance, are exceptions. In cases of the first-mentioned class the power and duty imposed cannot be delegated so as to exempt the person who accepts the duty imposed, from responsibility, and in those of the second class exemption from liability would be manifestly contrary to public policy, since it would shield the one who directed the commission of the wrong. *Storrs v. City of Utica*, 17 N. Y. 104; *Lowell v. L. & B. R. R. Co.*, 23 Pick. 24; *Hole v. S. S. R. R. Co.*, 6 H. & N. 488; *Butler v. Hunter*, 7 N. Y. 826.

There are cases of still another class where the thing contracted to be done is necessarily attended with danger, however skillfully and carefully performed, or, in the language of Judge Dillon, is "intrinsically dangerous," in which case it is held that the party who lets the contract to do the act cannot thereby escape from liability for any injury resulting from its execution, although the act to be performed may be lawful. 2 Dill. on Mun. Corp., § 1029, and cases cited.

When the work contracted for itself causes the danger or injury, the owner of the premises is liable to persons injured by the omission properly to protect the work, and cannot shield himself by plea and proof that the work was entirely committed to an independent contractor. *Ann v. Herter*, 79 App. Div. 6, 79 N. Y. Supp. 825, citing *Murphy v. Perlstein*, 73 App. Div. 256, 76 N. Y. Supp. 657; *Downey v. Lowe*, 22 App. Div. 460, 48 N. Y. Supp. 207, distinguishing *Beck v. Carter*, 68 N. Y. 283.

But if the act to be done may be safely done in the exercise of due care, although in the absence of such care injurious consequences to third persons would be likely to result, then the contractor alone is liable, provided it was his duty under the contract to exercise such care. *Engel v. Eureka Club*, 137 N. Y. 100 (104), citing *McCafferty v. S. D. & P. M. R. R. Co.*, 61 N. Y. 178; *Connors v. Hennessey*, 112 Mass. 96.

There are certain exceptional cases where a person employing

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a contractor is liable, which, briefly stated, are: Where the employer personally interferes with the work, and the acts performed by him occasion the injury; where the thing contracted to be done is unlawful; where the acts performed create a public nuisance; and where an employer is bound by a statute to do a thing efficiently and an injury results from its inefficiency. *Berg v. Parsons*, 156 N. Y. 109 (115).

That interference, assumption of control, or direction given by the owner may render him personally liable for injuries by a contractor is held in *Hawke v. Brown*, 28 App. Div. 37 (43), 50 N. Y. Supp. 1032, recognizing the general rule that one who has contracted with a competent and fit person, exercising an independent employment, to do a piece of work not in itself unlawful or attended with dangers to others, to be done according to the contractor's methods, will not be answerable for a wrong by said contractor, his subcontractors, or his servants, in the transaction of such work. Citing 2 Thomp. on Neg. 899, 909, 910; *Hexamer v. Webb*, 101 N. Y. 382; *Engel v. Eureka Club*, 137 N. Y. 100.

The authorities, relative to the liability of a municipality charged with the duty by statute of keeping its streets in a safe condition for travel, are collated in dissenting opinion, *per* Haight, J., in *Wolf v. American Tract Society*, 164 N. Y. 30 (37), and this general principle is reiterated in *Uppington v. City of New York*, 165 N. Y. 222 (232). When a city has power to let work and it enters into contract with competent contractors, doing an independent business, who agree to furnish the necessary materials and labor and make the entire improvement according to specifications prepared in advance, for a lump sum, or its equivalent, they are not the servants or agents of the city, but are independent contractors, and the city is not liable for their negligence, even when it reserves the right to change, inspect, or supervise to the extent necessary to produce the result intended by the contract, provided the plan is reasonably safe, the work is lawful, is not a nuisance when completed, and there is no interference therewith by municipal officers, which results in injury, citing numerous authorities. Same case, p. 233, lays down the rule that independence of control in employing workmen and in selecting the means of doing the work is the test usually applied by courts to determine whether the contractor is independent or not.

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But in *Schumacher v. The City of New York*, 166 N. Y. 103, affirming 40 App. Div. 320, it is held that a municipal corporation is liable for damages caused by an independent contractor in opening a street under a "permit," the right of inspection being reserved to the city authorities. The city had notice of the obstruction causing the damage, through the inspector so appointed, and under the circumstances the city was held to be responsible for failure to prevent the injury, on the ground that having provided gutters, culverts and sewers for the surface drainage, it was bound to use reasonable diligence to discover and remedy defects therein, citing *Uppington v. City of New York*, *supra*; *Barton v. City of Syracuse*, 36 N. Y. 54; *McCarthy v. City of Syracuse*, 46 N. Y. 194; *Hines v. City of Lockport*, 50 N. Y. 236; *Nims v. Mayor, etc., of Troy*, 59 N. Y. 500; *Mayor, etc., of New York v. Furze*, 3 Hill, 612.

The obligation of the municipality or other corporation for negligence of a contractor in carrying on work of a dangerous character is very fully considered, and the authorities are collated, analyzed, and distinguished in *Deming v. Terminal Railway of Buffalo*, 169 N. Y. 1, where it is held that a corporation cannot escape responsibility for putting a public street in a condition dangerous for travel at night by interposing a contract made for the work; that, although the work may be let by contract, the corporation still remains charged with the care and control of the street in which the improvement is carried on. This liability rests, not upon the negligence of the contractor, for which, under the doctrine *respondeat superior*, the municipality would not be responsible, but upon a breach of its duty to keep the highway in a safe condition for travel while the work is in progress.

#### SUBDIVISION 4.

##### Liability of Master for Acts of Servant.

It is the rule of the common law that the master is responsible for the acts of the servant whom he selects, and through whom in legal contemplation he acts, provided that the particular act was done by the servant in the carrying out of the duty given to him by his master, and for the purpose of doing what he has been set to do. *Buswell on Personal Injuries*, 38.

"Beyond the scope of his employment, the servant is as much a stranger to his master as any third person, and the act of the

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servant, not done in the execution of the service for which he was engaged, cannot be regarded as the act of the master. And if the servant step aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended, and an act of the servant done during such interval is not to be attributed to the master." *Higgins v. Western Union Telegraph Co.*, 156 N. Y. 75 (79).

Where the relation of servant and master exists, the master is responsible to third persons for damages caused by the wrongful acts or omissions of his servants in the course of their employment as such. *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124; *Ochsenbein v. Shapley*, 85 N. Y. 214.

It is absolutely essential, to establish a liability against an employer upon the ground that he is responsible for the act of his servant, that the strict relation of master and servant should exist. *Hexamer v. Webb*, 101 N. Y. 377; *Wyllie v. Palmer et al.*, 137 N. Y. 257.

The master is not liable for the acts of a volunteer assisting his servants. *Morrison v. Erie Ry. Co.*, 56 N. Y. 302; *Burrows v. Erie Ry. Co.*, 63 N. Y. 556. But is liable for the negligence of one whom his servant employs to assist him in his business. *Althorff v. Wolfe*, 22 N. Y. 355.

In *Mali v. Lord*, 39 N. Y. 381, it was held that, while the master is responsible civilly for the fraud, negligence, or other wrongful act of his servant, committed in the transaction of his business, he is not responsible for the willful injury committed by the servant while so engaged, unless he so act by the express or implied authority of his employer. While the latter statement has never been directly overruled, it has been so far questioned and limited as that the later authorities must be regarded as stating the correct rule upon this point.

In *Cosgrove v. Ogden*, 49 N. Y. 255, at 257, Grover, J., speaking for the court, says that the test of the master's responsibility for the act of his servant is not whether such act was done according to the instructions of the master to the servant, but whether it is done in the prosecution of the business that the servant was employed by the master to do; adding that the master is not liable for the act done by the servant to effect some purpose of his own, limiting language of the court in *Mali v. Lord*, 39 N. Y. 381, *supra*.

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The subject is very fully considered in *Rounds v. D., L. & W. R. R. Co.*, opinion Andrews, J., 64 N. Y. 129, where it is held that it is in general sufficient to make the master responsible, that he gave to the servant an authority, or made it his duty to act in respect to the business in which he was engaged when the wrong was committed, and that the act complained of was done in the course of such employment. That the master who puts a servant in a place of trust or responsibility, or commits to him the management of his business, or care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another.

This subject is further considered at page 136 in the opinion referred to, as follows:

“It seems to be clear enough from the cases in this State that the act of the servant causing actionable injury to a third person does not subject the master to civil responsibility in all cases where it appears that the servant was at the time in the use of his master’s property, or because the act, in some general sense, was done while he was doing his master’s business, irrespective of the real nature and motive of the transaction. On the other hand, the master is not exempt from responsibility in all cases on showing that the servant, without express authority, designed to do the act or the injury complained of. If he is authorized to use force against another when necessary in executing his master’s orders, the master commits it to him to decide what degree of force he shall use; and if, through misjudgment or violence of temper, he goes beyond the necessity of the occasion, and gives a right of action to another, he cannot, as to third persons, be said to have been acting without the line of his duty, or to have departed from his master’s business. If, however, the servant, under guise and cover of executing his master’s orders, and exercising the authority conferred upon him, willfully and designedly, for the purpose of accomplishing his own independent, malicious, or wicked purposes, does an injury to another, then the master is not liable. The relation of master and servant, as to that transaction, does not exist between them. It is a willful and wanton wrong and trespass, for which the master cannot be held responsible. And when it is said that the master is not responsible for

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the willful wrong of the servant, the language is to be understood as referring to an act of positive and designed injury, not done with a view to the master's service, or for the purpose of executing his orders."

In *Mott v. Consumers' Ice Co.*, 73 N. Y. 543, the subject was again considered in the opinion of Allen, J. At p. 548, the authority of *Isaacs v. Third Avenue R. R. Co.*, 47 N. Y. 122, is limited. At p. 547 it is said that the rule recognized in all the recent cases, and which does not materially conflict with any of the older decisions, although it may qualify some of the intimations and casual expressions or illustrations of the judges, is that for the acts of the servant, within the general scope of his employment, while engaged in his master's business, and done with a view to the furtherance of that business to the master's interest, the master will be responsible whether the act was done negligently, wantonly, or even willfully. In general terms, if a servant misconducts himself in the course of his employment, his acts are the acts of the master, who must answer for them. Still further, that if the servant acts outside of his employment, and without regard to his service, acting maliciously, or in order to effect some purpose of his own, wantonly commits a trespass or causes damage to another, the master is not responsible, so that the inquiry is, whether the wrongful act is in the course of the employment, or outside of it, and to accomplish a purpose foreign to it.

In *Lynch v. Metropolitan R. R. Co.*, 90 N. Y. 77 (87), it is said that the principles upon which the liability of a master rests have been so fully and plainly laid down, in recent cases, that a restatement would serve no useful purpose, citing 64 N. Y. 129, and 73 N. Y. 543, *supra*, to the point.

The rule cited from 73 N. Y. 543 is reiterated and restated in *Girvin v. N. Y. C. & H. R. R. Co.*, 166 N. Y. 289 (291).

The language of Allen, J., in *Mott v. Consumers' Ice Co.*, 73 N. Y. 543, is also cited with approval by Bartlett, J., in *Craven v. Bloomingdale*, 171 N. Y. 439 (449).

"That the master is liable for the negligence or misfeasance of the servant while the latter is acting in the master's business, and within scope of the servant's employment, is not disputed. Nor is it denied that such liability exists, notwithstanding the fact that the servant's negligent act is contrary to the master's direction, and, as between the two, a violation of the duty which the latter

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owes to the former. It is not correct, therefore, and leads to an erroneous result, to describe the master's freedom from liability as arising where the servant has departed from his 'line of duty in' his master's business, which is a mode of stating the rule adopted in the opinion of the General Term upon the first argument of this case before that tribunal. Such a statement of the law might excuse every deviation from the master's orders, and substitute a new and very dangerous test of liability." *Quinn v. Power*, 87 N. Y. 535 (537).

A common carrier is civilly liable for all the unlawful acts of its servants, done in the prosecution of the business intrusted to them. If its passengers are injured thereby, good faith and motives on the part of a servant are not a defense, and such a corporation is liable for acts of injury and insult by an employee, although any departure from the authority conferred or implied in them grew in the course of the employment. *Palmieri v. Manhattan R. R. Co.*, 133 N. Y. 261, distinguishing *Mali v. Lord*, 39 N. Y. 381; citing *Rounds v. D., L. & W. R. R. Co.*, 64 N. Y. 129, and distinguishing *Mulligan v. N. Y. & Rockaway Beach Ry. Co.*, 129 N. Y. 506.

Whatever may be the motive which incites a servant to commit an unlawful or improper act toward a passenger during the existence of carrier and passenger, the carrier is liable for the act and its natural and legitimate consequences. *Dwinelle v. N. Y. C. & H. R. R. Co.*, 120 N. Y. 117.

*Kastner v. Long Island R. R. Co.*, 76 App. Div. 323 (324), 78 N. Y. Supp. 469, cites *Cosgrove v. Ogden*, 49 N. Y. 255, to the point that it is the settled doctrine that a master may be held responsible for the acts of his servant within the general scope of his employment, while engaged in the master's business, even though the servant may have disregarded some particular direction of the master in respect to the manner in which he shall discharge his office.

This rule is also laid down in *Higgins v. Watervliet Turnpike R. R. Co.*, 46 N. Y. 23; *Hoffman v. N. Y. C. & H. R. R. Co.*, 87 N. Y. 23; *Schultz v. Third Ave. R. R. Co.*, 89 N. Y. 242.

A carrier is liable for delay in transportation of goods or property caused by the willful act of his servant, although directly contrary to his orders, and even though committed for the purpose

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of injuring him. *Weed v. The Panama R. R. Co.*, 17 N. Y. 362; *Blackstock v. The N. Y. & Erie R. R. Co.*, 20 N. Y. 48.

But where the carrier's servants left his service and violently prevented new servants from acting, it was held that the carrier was not liable. *Geismar v. Lake Southern & Michigan Southern Ry. Co.*, 102 N. Y. 563.

It is a well-settled principle that, if a servant commit a tort while acting within the course of his employment, he and his master are each liable for the resulting damage. *Wright v. Wilcox*, 19 Wend. 343.

SUBDIVISION 5.

Liability of Master to Servant.

The question of liability of the master to the servant is substantially a part of the law of negligence since it is almost exclusively in actions brought by the servant for negligence of the master that the duty of the master to the servant becomes material; hence the subject will be very briefly considered, and only a few of the more important rules cited from some of the leading authorities.

The relation of master and servant and their reciprocal duties and obligations have been changed in very many material respects by Laws of 1902, chap. 600, entitled "An act to extend and regulate the liability of employers to make compensation for personal injuries suffered by employees," known as "Employer's Liability Act." This act has not received judicial construction, and it is difficult, in fact impossible, to determine the full nature and extent of the limitations which it has placed upon the liability of the employed, or in what respect it has given rights of action to employees, in addition to those heretofore existing. It will be borne in mind that the decisions hereinafter referred to were made in cases arising previous to the passage of the act in question.

In view of the provisions of the Laws of 1902, no attempt is made to collate authorities or lay down any rule as to what constitutes a fellow-servant, as bearing upon the liability of the employer for the act of a person in charge or control, since the provisions of sections 1 and 2 of that act materially change the rules heretofore laid down by the courts.

A master is bound to use reasonable and ordinary care to prevent injury to his servant in the course of his employment, and if he does not, and the servant is injured in consequence thereof, the



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master will be answerable for the damages, unless the servant assumes the risk, or by his own act contributes to the injury. 20 Am. & Eng. Encyc. of Law, 54.

In Leavitt's Code of Negligence, § 74, it is said that the master owes to each of his servants the following duties, in addition to those imposed upon him by specific statutes:

(1) To promulgate for their guidance and protection adequate rules for the proper transaction of his business.

(2) To see that his rules do not fall into general disuse.

(3) To have minors and inexperienced servants instructed as to any dangers in the work they are employed to do, as to which they are uninformed.

(4) To employ servants who are competent to do what they are employed to do.

(5) To discharge a servant who becomes incompetent.

(6) To employ a sufficient number of servants to do his work properly and safely.

(7) To see that the place where his servants are to work is reasonably safe.

(8) To see that the machines, tools, or other appliances, which he provides are in good order and reasonably fit for the work in hand.

(9) To warn his servants of risks in their work, which are not obvious.

(10) In factories to provide fire-escapes.

The master owes certain duties to the servant concerning his safety, and he cannot rid himself of responsibility for their non-performance by delegating them to another servant who neglects to follow his instructions or omits to perform the duty intrusted to them. McKinney on Fellow-Servants, § 24; Shearman & Redfield, § 204.

Ruger, Ch. J., in *Pantzar v. Tilly Foster Iron Co.*, 99 N. Y. 368 (375), cites and adopts the rule from *Leonard v. Collins*, 70 N. Y. 90. That the rule is to inquire whether the master did everything which, in the exercise of reasonable and ordinary care and prudence, he ought to have done. Did he omit any precaution which a prudent or careful man would take, or ought to have taken?

The master does not guarantee the safety of his servants. He is not bound to furnish them an absolutely safe place to work in, but is bound simply to use reasonable care and prudence in provid-

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ing such a place. He is not bound to furnish the best-known appliances, but only such as are reasonably fit and safe. He satisfies the requirements of the law if, in the selection of machinery and appliances, he uses that degree of care which a man of ordinary prudence would use, having regard to his own safety, if he were supplying them for his own personal use. It is culpable negligence which makes the master liable, not a mere error of judgment. *Harley v. Buffalo Car Mfg. Co.*, 142 N. Y. 31 (34).

*Simone v. Kirk*, 173 N. Y. 7 (13), cites a large number of the later authorities in that court to the proposition that "It is the duty of the master employing servants to use reasonable care to provide them with proper appliances and a safe place to work, and this duty is so firmly fastened upon him by law that he cannot delegate it without liability for the negligence of the one to whom he intrusts it. The duty of using reasonable care in inspecting the place where servants are set at work is also the master's duty which he must properly discharge at his peril, either personally or through another. Certain work is inherently dangerous, and yet the master has the right to hire servants to do it. In such cases, however, unless the danger is obvious to an ordinary observer, it is his duty to give them due warning, so that they may refuse to work if they do not wish to run the risk, and proper instructions so that if they enter upon the work they may be able to take care of themselves."

A duty which a master is bound to perform for the safety and protection of his servant cannot be delegated so as to exonerate him from liability, and this whether the misfeasance or non-feasance is that of a superior or inferior officer, agent, or servant. The act or omission is that of the master irrespective of the question whether it was or was not practicable for the master to act personally, or whether he did or did not do all he personally could to secure the safety of the servant. *Fuller v. Jewett*, 80 N. Y. 46.

In *Eaton v. N. Y. C. & H. R. R. Co.*, 163 N. Y. 391 (395), it is said, citing *Fuller v. Jewett*, 80 N. Y. 46, and quoting from *Bailey v. R., W. & O. R. R. Co.*, 139 N. Y. 302, that "A master is never exonerated by the negligent omission of subordinates to perform duties which are imposed upon him, as master, resulting in injury to other employees."

The master is responsible to other servants for the negligence of any person to whom he has delegated a duty which he himself is

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bound to perform, so long as such person is acting in that capacity, to the same extent as if the negligence were his own. *Corcoran v. Holbrook*, 59 N. Y. 517; *Pantzar v. Tilly Foster Iron Co.*, 99 N. Y. 368.

While an employer is responsible to third persons for the wrongful acts of his servants, he is not responsible for injuries sustained by one servant through the negligence of another. Where a master uses due diligence in the selection of competent and trusty servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable, in the absence of statutory liability, to one of them for an injury received by him in consequence of the carelessness of another, while both are engaged in the same business. 12 Am. & Eng. Encyc. of Law (2d ed.), 897.

One servant cannot maintain an action against his employer for injuries sustained in consequence of the negligence of another employee engaged in the same general business. *Sherman v. Rochester & Syracuse R. R. Co.*, 117 N. Y. 153 (155), citing numerous authorities.

Where there is not a common master, they are not coservants. Each is entitled to protection against the negligence of the other. *Sullivan v. Tioga R. R. Co.*, 112 N. Y. 643 (648); *Sanford v. S. O. Co.*, 118 N. Y. 571; *Smith v. N. Y. & H. R. R. Co.*, 19 N. Y. 127.

It is quite clear and well established that the principal is responsible for injuries resulting to his employees from his personal negligence or misfeasance. *Ryan v. Fowler*, 24 N. Y. 410 (413).

A master, who himself takes part in the servant's work, and while so doing injures the servant through negligence, is liable for such injuries. And if the master is a member of a copartnership by whom the servant is employed, the copartners are jointly liable for such negligence. McKinney on Fellow-Servants, § 151.

Reasonable care on the part of a servant in the performance of his work presupposes the performance by the master of his duty to do all that reasonably lies within his power to protect the servant while so engaged. *Pantzar v. Tilly Foster Iron Co.*, 99 N. Y. 368; *McGovern v. Central Vermont R. R. Co.*, 123 id. 280.

If the personal fault of the master proximately contributes to the servant's injury, it is no defense that the negligence of a fellow-servant also contributed to the injury. It is settled, upon

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principle and authority, that negligence of the servant does not excuse the master from liability to the coservant for injury, which would not have happened had the master performed his duty. *Cone v. D., L. & W. R. R. Co.*, 81 N. Y. 206; *Stringham v. Stewart*, 100 N. Y. 516; *Coppins v. N. Y. C. & H. R. R. R. Co.*, 122 N. Y. 557.

If the master neglects his duty and injury to a servant results, the company is liable, although negligence of a coemployee contributed to the result. *Booth v. B. & A. R. R. Co.*, 73 N. Y. 38.

Where a servant is injured by the negligence of the master and the concurrent negligence of a fellow-servant, the master is liable where the negligence is the proximate cause of the injury. *Flike v. B. & A. R. R. Co.*, 53 N. Y. 549; *Booth v. B. & A. R. R. Co.*, 73 N. Y. 38; *Lilly v. N. Y. C. & H. R. R. R. Co.*, 107 N. Y. 506.

Where an injury is occasioned to a servant, partly through defective machinery and partly through the negligence of a fellow-servant, the master is not exonerated. *Ellis v. N. Y., L. E. & W. R. R. Co.*, 95 N. Y. 546; *Lilly v. N. Y. C. & H. R. R. R. Co.*, 107 N. Y. 566.

Where a servant has full knowledge of the situation and of the arrangements for the protection of persons made by the master, by continuing in the employment he assumes the risks and hazards incident to the situation. Where the dangers to the servant are known and obvious, he takes the risk of such dangers connected with his employment. *Anthony v. Leeret*, 105 N. Y. 591; *Huda v. Glucose Mfg. Co.*, 154 N. Y. 474.

That the servant cannot recover where injury is brought about by contributory negligence on his part is held in *Hartwig v. Bay State Shoe & Leather Co.*, 118 N. Y. 664.

The rule as to assumption of risk and contributory negligence in connection with the burden of proof, as between master and servant, is fully considered in *Dowd v. N. Y., O. & W. R. R. Co.*, 170 N. Y. 459, opinion Vann, J.

A common laborer in a dangerous occupation who has been away from his employment, and upon his return works for a week with appliances which to his knowledge have been changed in his absence, but who did not know of the danger the change involved, cannot be said as a matter of law to have assumed the risk of the use of the appliances by continuing in the employment unless their defects were obvious. *Welle v. Celluloid Co.*, 175 N. Y. 401.

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## ARTICLE VIII.

## PRINCIPAL AND AGENT.

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## SUBDIVISION 1.

## Powers and Liabilities of Agents.

An agent in possession, or entitled to possession of his principal's property has an action against a third person who injures or converts it. *Tuthill v. Wheeler*, 6 Barb. 362; *Faulkner v. Brown*, 13 Wend. 63.

Where an agent has an action for injury to his principal's property he may recover the full damage. *Mechanics & Traders' Bank v. Farmers & Mechanics' Nat. Bank*, 60 N. Y. 40.

An agent is always liable to third persons for his misfeasance. *Crane v. Onderdonk*, 67 Barb. 47.

An agent committing conversion is liable where his principal is liable, even though the agent acted innocently and in good faith, relying on his principal's right. *Sprights v. Hawley*, 39 N. Y. 441.

An agent is not liable for false representations as to facts not peculiarly within his knowledge where he gives the sources of information and assumes no responsibility personally. *Griffing v. Diller*, 50 St. Rep. 435, 21 N. Y. Supp. 407.

Where the agent fails to perform a duty which the principal owed to a third person, the remedy of such person is against the principal, not the agent. *Denny v. Manhattan Co.*, 5 Den. 639; *Phinney v. Phinney*, 17 How. Pr. 197.

An agent is not liable to third persons for an omission or neglect of duty in the matter of his agency, but the principal is alone responsible. *Colvin v. Holbrook*, 2 N. Y. 126; *Hall v. Lauderdale*, 46 N. Y. 70.

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SUBDIVISION 2.

Liability of Principal for Tortious Acts of Agent.

The relation of principal and agent is nearly, yet not absolutely identical with that of master and servant. Bishop, § 696.

As a servant is liable for his own torts, so also is one who is termed agent. Thus if he assists a principal in a breach of trust he is personally responsible. Bishop, § 695.

As to the difficulty of distinguishing between the rules governing principal and agent from those governing master and servant, Bigelow on Torts (7th ed.), p. 39, says:

“Closely allied to master and servant, for the purposes under consideration, is the relation of principal and agent. It is sometimes put as a distinction between the two relations, that a servant can exercise no independent discretion, but is subject at all times to the control and direction of the master, while an agent acts largely upon his own discretion; but the distinction will not bear examination. \* \* \* The real difference is in the kind of discretion to be exercised; an agent, while, like a servant, subordinate to and independent of his employer, is employed to make contracts for his principal. That makes a fundamental difference; but it does not bring about any special result in regard to the principal's liability for his agent's torts. The liability of a principal is the same as that of a master, whatever the tort.”

As to the liability of the principal for misrepresentations made by the agent, Fraser on Law of Torts (5th ed.), 153, says: “The agent himself is personally liable according to the general rules governing law as to fraud. The liability of the principal depends on several considerations.” The liability of the principal is then tabulated in the form of rules governing all circumstances.

“In order that responsibility may attach to the principal in respect to a tort committed by his agent, it is necessary:

- (1) That such principal authorized the commission of the tort in the first instance; or
- (2) That he has made it his own by adoption or ratification; or
- (3) That the tort was committed by the agent in the course and as part of his employment.

As a general rule a principal is not liable for the torts of his agent except upon some one of the grounds mentioned above.”

It follows, from the principles of agency, coupled with the doc-

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trine that each partner is the agent of the firm for the purpose of carrying on its business in the usual way, that an ordinary partnership is liable in damages for the negligence of any one of its members in conducting the business of the partnership. As a rule, however, the willful tort of one partner is not imputable to the firm. For example, if one partner maliciously prosecutes a person for stealing partnership property, the firm is not answerable, unless all the members are, in fact, privy to the malicious prosecution. *Newell on Malicious Prosecution*, § 103.

A principal whose negligence has enabled his agent to cheat a third person acting with ordinary caution is universally estopped from denying the authority of the agent. 2 *Addison on Torts*, 1178.

But a party who claims the benefit of this estoppel must show that he has acted in the transaction in which he was deceived with ordinary caution. 2 *Addison on Torts*, 1179.

If a fraudulent act has been committed by the agent without knowledge of the principal, and the latter afterward adopts the act and takes the benefit of the fraud, he will be responsible in damages to the person who has been deceived or injured by the fraudulent act. 2 *Addison on Torts*, 1036, citing *Wright v. Crookes*, 56 N. Y. 39.

But if he repudiates the transaction as soon as he becomes acquainted with the fraud, he will not be responsible for the fraud if it was committed by the agent without his sanction or authority, and the representations are not within the ordinary scope of the authority of an agent acting in such a matter. 2 *Addison on Torts*, 1036.

The principal is liable for damage occasioned by the wrongful act of his agent notwithstanding it was willful, if within the scope of his authority. *Weed v. Panama R. R. Co.*, 17 N. Y. 362.

Though a sales agent, as such, has no authority to make a warranty, yet if he sells animals knowing that they are diseased and does not communicate the fact, the principal is liable, not for the breach of warranty, but for the suppression of truth. *Jeffrey v. Bigelow*, 13 Wend. 518.

In general a principal is liable for conversion by his agent. *Shotwell v. Few*, 7 Johns. 302; *Cobb v. Dows*, 10 N. Y. 335.

If an agent's authority is capable of being executed in a lawful manner it is not usually extended by construction to include pro-

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hibited acts so as to render the principal liable on a penalty. *Clark v. Metropolitan Co.*, 10 N. Y. Super. 241; *Commissioners of Pilots v. Pidgeon*, 23 Hun, 346. Compare, however, *Davis v. Bemis*, 40 N. Y. 453.

An agent has no implied authority to commit a trespass. *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y. 479.

Where an agent employed for a special purpose makes false representations, which are acted upon, the principal is liable the same as if the representations were made by himself. *Sandford v. Handy*, 23 Wend. 260.

"When a party clothes another with authority to speak in his behalf, and indorses him to third persons as worthy of trust and confidence, those who are misled by the falsehood and fraud of the agent are entitled to impute it to the principal. The latter will not be permitted to retain the fruits of a transaction infected with fraud, whether the deceit, which he seeks to turn to his profit, was practiced by him or by his accredited agent. In such a case he cannot separate the legal from the illegal elements of the contract, and appropriate the advantages it secures, while he rejects the corrupt instrumentalities by which they were obtained." *Smith v. Tracy*, 36 N. Y. 79, 83.

In *Nowack v. Metropolitan St. Ry. Co.*, 166 N. Y. 433 (440), it is said that the general rule is that the principal is liable to a third person in a civil action for the fraud or other malfeasance of his agent, perpetrated by the latter in the course of his employment, although the act was *ultra vires*, and the principal did not authorize, justify or know of it, citing *Palmeri v. Manhattan Ry Co.*, 133 N. Y. 261; *Fifth Avenue Bank v. Forty-second St. & G. S. F. R. R. Co.*, 137 N. Y. 231; *Jarvis v. Manhattan Beach Co.*, 148 N. Y. 652; *Stewart v. B. & C. R. R. Co.*, 90 N. Y. 588.

An innocent principal cannot take an advantage resulting from the fraud of an agent without rendering himself civilly liable to the injured party. *National Life Ins. Co. v. Minch*, 53 N. Y. 144 (149).

A sheriff is liable for a trespass or misfeasance of his deputy while acting under color of his office. *Waterbury v. Westervelt*, 9 N. Y. 598.



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## SUBDIVISION 3.

## Rights of Principal as against Agent.

An agent owes to his principal a like duty to that which a trustee owes to a *cestui que trust*. There is this important difference in the cases. As the supervision of trusts belongs to equity, wrongs by trustees must generally be redressed in that court, while wrongs by agents will be redressed at law, unless the case is such that some peculiar relief which equity only can give is required. Cooley, 615.

The test of the liability of the agent to his principal for damages done by reason of the alleged negligence is, speaking generally, the conduct of a diligent or careful or skillful agent in a like situation. If the agent's actions conform to this standard, he will be exempt from liability; otherwise not. Bigelow (7th ed.), 345.

A principal and agent also assume toward each other certain duties of due care. The agent must not be negligent in the performance of his trust, and the principal must not negligently lead the agent into danger. Cooley (2d ed.), 615.

It will be noted that some transactions, ordinarily legal between the parties, may assume a tortious aspect if they take place between those in a fiduciary capacity or trust relation. Thus, "An agent empowered to sell property for his principal; he cannot become purchaser directly nor by indirection through another." Cooley on Torts, 614, citing *Dobson v. Rasey*, 8 N. Y. 216; *People v. Merchants' Bank*, 35 Hun, 97.

But an agent without reward is not answerable for nonfeasance; he becomes responsible if he attempts to act and is guilty of negligence. *Thorne v. Deas*, 4 Johns. 84; *Smedes v. Utica Bank*, 20 Johns. 372.

An agent is not liable for deviation from instructions in cases of emergency. *Milbank v. Dennistoun*, 21 N. Y. 391; *Jervis v. Hoyt*, 2 Hun, 637.

A total departure from instructions may amount to conversion. *McMorris v. Simpson*, 21 Wend. 610; *Scott v. Rogers*, 31 N. Y. 676.

An agent for remuneration must use reasonable skill and ordinary diligence in the line of business. He is liable to his principal for damages sustained by want of ordinary skill and diligence. *Heinemann v. Heard*, 50 N. Y. 27; *Gleason v. Clark*, 9

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Cow. 57; *First Nat. Bank of Meadeville v. Fourth Nat. Bank*, 77 N. Y. 320.

An agent is liable to his principal for the loss resulting from disobedience to his instructions. *Rundle v. Moore*, 3 Johns. Cas. 96; *Heinemann v. Heard*, 50 N. Y. 27; *Lavery v. Snethen*, 68 N. Y. 522; *Johnson v. N. Y. Cent. R. R. Co.*, 33 N. Y. 610; *Perkins v. Washington Ins. Co.*, 4 Cow. 645.

SUBDIVISION 4.

Right of Principal to Follow Funds Diverted by Agent.

The general and well-recognized rule is and has been, that a principal is entitled in all cases when he can trace *his property* whether it be in the hands of his agent or of his representatives, or of third persons, to reclaim it; and it is immaterial that it may have been converted into money, so only that it is in condition to be distinguished from the *other property or assets of the agent*. *Importers, etc., Bank v. Peters*, 123 N. Y. 272, 277, 278.

The cases upon this head are very numerous, where there has been a misapplication of trust funds by trustees or persons standing in a fiduciary relation, and the money or property has been laid out in land or converted into other species of property. The court in such cases lays hold of the substituted property and follows the original fund, through all the changes it has undergone, until the power of identification is lost or the rights of *bona fide* purchasers stop the pursuit, and holds it in its grasp, to indemnify the innocent victim of the fraud." *American Sugar Refining Co. v. Fancker*, 145 N. Y. 552 (557).

While to entitle a principal to recover money wrongfully paid by his agent upon a debt of the latter, he must show that the creditor knew that the agent was acting in violation of his authority, knowledge that the money was held by him as agent is sufficient to establish this *prima facie*, as the legal presumption is that an agent has no authority to dispose of the property of his principal in payment of his own debt.

One, therefore, who receives such payment, with knowledge that the money was held by his debtor as agent, does so at his peril, and to defeat a recovery must show authority in the agent to so dispose of the money. *Gerard v. McCormick*, 130 N. Y. 261.

The payee of corporate checks who receives them from the treas-

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urer of the corporation in payment of a debt not owed by the corporation, but in payment of one which he has treated as the treasurer's individual debt, where the latter has no actual or apparent authority to issue such checks either in payment of his own debt or that of a third person, is chargeable with notice of his incapacity to issue them and is bound to inquire as to the real situation, and where he accepts the checks without question and draws the money thereon, he is liable in an action by the corporation to recover the amount paid as money received by him to its use. *Rochester & C. T. R. R. Co. v. Paviour*, 164 N. Y. 281.

It is well settled that where one occupies the relation of agent to another, and in that relation makes an investment for such other, with the money of his principal, the principal is entitled, not only to the property bought, but to the proceeds of that property so long as it can be traced and identified. *Harding v. Field*, 1 App. Div. 391 (393), 37 N. Y. Supp. 399.

## ARTICLE IX.

## LANDLORD AND TENANT.

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## SUBDIVISION 1.

## Liability of Landlord to Tenant.

As between landlord and tenant, there is no implied obligation on the part of the former that the property is in a safe condition. With regard to third parties, the tenant is the person responsible for any injury resulting from the premises being out of repair, and the landlord will also be responsible if he has done any act authorizing the continuance of the dangerous state of the house. *Moak's Underhill on Torts* (Rule 22), citing *Keates v. Cadogan*, 10 C. B. 591; 20 L. J. C. P.; *Pretty v. Bickmore*, L. R., 8 C. P. 404, 6 Eng. Rep. 182.

If premises are in good repair when demised, but afterward become dangerous, the landlord is not responsible therefor to the occupant, unless he has expressly agreed to repair, or has renewed

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the lease after the need of repair has shown itself. This rule holds as to the lessee out of possession who sublets to another who is in possession. *Clancy v. Byrne*, 56 N. Y. 129.

A lessor of buildings, in the absence of fraud, or any agreement to that effect, is not liable to a lessee, or others lawfully upon the premises, for their condition, or that they are tenantable and may be safely and conveniently used for the purposes for which they are apparently intended. *Jaffe v. Harteau*, 56 N. Y. 398.

There is no implied warranty upon the demise of real estate that it is fit for occupation or suitable for the purpose for which it is leased. But where the owner leases premises knowing they are dangerous and unfit for the use for which they are hired, and fails to disclose their condition, he is guilty of negligence and may be held responsible for injuries resulting therefrom.

If he has created no nuisance and is guilty of no wrong or fraud, or culpable negligence, he is not liable for the injury suffered by a person occupying or going upon the premises during the term. *Edwards v. N. Y. C. & H. R. R. Co.*, 98 N. Y. 245.

While, as a general rule, a landlord, in the absence of any agreement or fraud, is not liable to the tenant for the condition or tenantable use of premises demised, that rule is subject to exception.

If the premises are in such a dangerous condition as to constitute a nuisance at the time of the renting, the landlord remains liable for the consequences of the nuisance, notwithstanding that his lessee may also be liable. If the premises are rented for a public use for which the landlord knows they are unfit and dangerous, he is guilty of negligence and may become responsible to persons suffering injury while rightfully using them. *Barrett v. Lake Ontario Beach Improvement Co.*, 174 N. Y. 310, citing *Jaffe v. Harteau*, 56 N. Y. 398; *Swords v. Edgar*, 59 N. Y. 28; *Fox v. Buffalo Park*, 21 App. Div. 321, 47 N. Y. Supp. 788, affirmed 163 N. Y. 559; *Edwards v. N. Y. & H. R. R. Co.*, 98 N. Y. 245.

In *Rauth v. Davenport*, 60 Hun, 70, 14 N. Y. Supp. 69, it was held that where the property of a tenant had been damaged by rain from a defective roof, which was under the control of the landlord, who promised to repair it properly, in consideration of which promise tenant consented to remain in occupation of the premises, the tenant could recover, because of such promise, the damages resulting to him from a subsequent rain.

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This case was distinguished in *Bronner v. Walter*, 15 App. Div. 295 (297), 44 N. Y. Supp. 583, where it was held that a landlord is not bound to repair the roof of a demised dwelling, unless he covenants to do so, and his mere promise subsequent to the lease to make repairs is without consideration.

A landlord cannot be compelled to rebuild or repair a building for the benefit of his tenant, unless he has expressly covenanted to do so. In an action to recover for damage to plaintiff's goods by reason of the failure of the landlord to proceed with due diligence to repair, it was held that he was not bound to protect the tenant's property from the weather. *Doupe v. Gerrin*, 45 N. Y. 119.

**SUBDIVISION 2.****Rights of Third Persons against Landlord.**

If premises are in good repair when demised, but become dangerous during the term, the landlord is not responsible therefor to the public unless he has expressly agreed to repair, or renewed the lease after the need of repair has shown itself. This rule applies to the lessee out of possession, who has sublet to another, who is in possession, and this is so, although by his covenant with his landlord such lessee is bound to make all ordinary repairs; the covenant does not give a right of action to, or impose a liability in favor of a stranger. *Clancy v. Byrne*, 56 N. Y. 129.

But where the premises are out of repair at the time they are leased, in particulars which the landlord is bound as against third persons not to allow, the landlord is liable for any injuries sustained by third persons from want of such repair. *Swords v. Edgar*, 59 N. Y. 28; *Waggoner v. Jermaine*, 3 Den. 306; *Irvine v. Wood*, 51 N. Y. 224.

Where the owner of premises knows, or by an exercise of reasonable care can ascertain, that they have upon them a nuisance dangerous to the public and adjoining owner, it is his duty to abate it before leasing the property; if he leases without doing this, he is liable to respond in damages to any one injured in consequence of the nuisance; and this is so, although he did not create the nuisance. *Timlin v. Standard Oil Co.*, 126 N. Y. 514.

In *Reynolds v. Van Beuren*, 155 N. Y. 120; *Sterger v. Van Sicklen*, 132 N. Y. 499, the question as to whether a landlord's covenant to make repairs to premises shall inure to the benefit of

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a stranger, is considered and authorities cited, and it is held that such covenant does not inure to the benefit of the stranger sustaining an injury because of its breach.

Toward the general public represented by the municipality, an implied duty rests upon the owner to use reasonable care in inspecting and repairing a grate, constructed by him with the consent of the municipal authorities, in a sidewalk in front of his premises, when a part only of the structure on the abutting land is leased to and occupied by a tenant, but that part includes by implication the exclusive right to use the grate as a beneficial appurtenance. *Trustees of Canandaigua v. Foster*, 156 N. Y. 354.

In *Jennings v. Van Schaick*, 108 N. Y. 530, it was held that although the rule is that when a landlord lets premises to a tenant, the landlord reserving no control, and the tenant carelessly leaves open the coal-hole, whereby some one is injured, the tenant, and not the landlord, is liable; that when the building is rented in flats and apartments, and the owner remains in control to some extent, and controls the coal-hole, and the opening in the sidewalk thereto, and through negligence, in leaving the opening open and unguarded, an injury occurs, the owner is liable. Cited with approval in *Babbage v. Powers*, 130 N. Y. 281 (288).

In both cases the effect of permits by a municipality to construct a vault under the sidewalk, upon the question of nuisance, is considered and determined. See also, as to the latter principle, *Jorgenson v. Squires*, 144 N. Y. 280.

SUBDIVISION 3.

Rights of Third Persons against Tenant.

Generally and *prima facie*, where lands are in the occupation of a tenant, he alone is responsible for any nuisance thereon arising from their being out of repair. The landlord is only liable where he demised the premises with the nuisance thereon, or covenanted to repair. A grantee or devisee of premises, upon which there is a nuisance at the time the title passes, is not responsible therefor until he has had notice thereof. The authorities on the subject of the liability of the owner of demised premises for a nuisance thereon are collated and considered. *Ahern v. Steele*, 115 N. Y. 203.

A tenant who sublets premises knowing, or being chargeable

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with knowledge of the existence of a nuisance, is liable for damage resulting therefrom, but responsibility for such nuisance is not imposed upon a tenant merely by his acceptance of the lease, and to establish liability on his part it must be shown that he either had notice of the existence of the nuisance, or that sufficient time had elapsed in which he could have obtained notice thereof by exercise of proper care. *Timlin v. Standard Oil Co.*, 126 N. Y. 514.

The lessee of a railroad is bound to keep it in repair and to protect those who have occasion to use it, from any injury in consequence of its dilapidated condition, the lessor out of possession has no such obligation, and is not liable for negligence or torts of the lessee. *Miller v. N. Y., L. E. & W. R. R. Co.*, 125 N. Y. 122.

When the owner lets different parts of the same building to different tenants, each tenant has the right as against every other that such other tenant shall not injure him by any active interference with the part which such other tenant occupies. There is an obligation on the part of one tenant to exercise reasonable care not to alter the condition of that part of the premises which he occupies so as to injure other tenants in the same building. *Quigley v. Johns Mfg. Co.*, 26 App. Div. 434, 50 N. Y. Supp. 98.

A covenant by a tenant to keep demised premises in repair does not inure to the benefit of a stranger who sustains an injury in consequence of its breach; it can only be enforced by the covenantee or his assignee. A lessee, by negligently suffering the demised premises to become dangerous, is liable to the stranger who has been injured in consequence. He is not a guarantor of the safety of the premises, and is bound only to exercise reasonable care. Negligence must be established as matter of fact. Mere constructive negligence is not sufficient. *Odell v. Solomon*, 99 N. Y. 635.

The provisions of the Laws of 1860, chap. 345, relieving a tenant from the payment of rent of a building which, without fault or negligence upon his part, shall have been destroyed or so injured as to be untenable, have reference to a destruction or injury resulting from some sudden and unexpected action of the elements or other cause, and not to the gradual deterioration and decay produced by the ordinary action of the elements. It does not affect the common-law rule requiring the tenant to make ordinary repairs. *Suydam v. Jackson*, 54 N. Y. 450, cited in *Ed-*

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*wards v. McLean*, 122 N. Y. 302; *Messerole v. Hoyt*, 161 N. Y. 59; *Rice v. Culver*, 172 N. Y. 65.

SUBDIVISION 4.

When both Landlord and Tenant are Liable to Third Persons.

The occupants of a pier are primarily chargeable with the duty of keeping it in repair, but where it is leased, and at the time of the demise and delivery of possession to the lessee it is in defective and unsafe condition, and, in consequence, an injury happens to one lawfully thereon, the lessor who is receiving the benefit by way of rent or otherwise is liable. A covenant in the lease binding the lessee to keep the pier in good order and repair does not remove or affect this liability to a third person on the part of the lessor. *Swords v. Edgar*, 59 N. Y. 28.

Where a coal-hole had been excavated in the sidewalk of a city and not properly covered, being used by a lessee of the premises for the benefit for which it was excavated, and, in consequence of a defective covering, a person passing by went through and was injured, the lessee was held liable separately or jointly with the lessor for the injuries resulting. *Irvine v. Wood*, 51 N. Y. 224.

The liability of landlord and tenant to third persons is very fully considered in *Timlin v. Standard Oil Co.*, 126 N. Y. 514, distinguishing *Edwards v. New York & Harlem Ry. Co.*, 98 N. Y. 245. It is held in the principal case that where the owner of premises knows, or, by the exercise of reasonable care, can ascertain, that they have upon them a nuisance, dangerous to the public or an adjoining owner, it is his duty to abate it before leasing the property; if he leases without doing this, he is liable to respond in damages to any one injured in consequence of the nuisance; and this is so although he did not create the nuisance. The same liability rests upon a tenant who sublets the premises knowing or being chargeable with knowledge of the existence of the nuisance.

ARTICLE X.

PARTNERS.

The rule as to the liability of one partner of a firm for the tortious acts of its members is clearly laid down in Cooley Elements of Torts, p. 33. He says: "Persons associated in business may jointly be liable for torts, though not all directly participating in



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the commission thereof. But the circumstances must be such that the assent of all to the wrongful act is to be implied. The fact that two or more persons are partners in business does not raise a presumption that each of them makes the others his agent for the commission of wrongs upon third persons. A partnership has lawful objects in view; and the implied authority of each to act for all goes no farther than to give sanction to such steps as have in view the accomplishment of those objects; to that extent all are liable. Therefore, for a false warranty in a sale, a deception in making a purchase, and the like, where what is done is a partnership transaction, though done by a single partner, without the presence or knowledge of others, or even by an agent acting under partnership authority, all will be responsible; while on the other hand an act of violence committed by a partner, or any wrong not a part of a partnership transaction and not accompanied by circumstances of apparent sanction by the associates to justify its being imputed to all, is to be deemed the wrong only of the party committing it."

A firm is liable for any loss or injury caused to any person not a member of the firm, or for any penalty incurred for any wrongful act or omission of the person acting in the ordinary course of the business of the firm, or with the authority of his copartners. 22 Am. Encyc. 166.

A firm is liable for the fraudulent misappropriation of the funds, and the like, committed by one of the partners in the course of the business and within the scope of his usual authority, even though no benefit be derived therefrom by the other partners, but the firm is not liable if the transaction undertaken by the defaulting partner is outside the partnership business. Pollock on Torts, 114; *Church v. Sparrow*, 5 Wend. 223.

If one partner commits a fraud in the course of the partnership business all the partners may be liable therefor, although they may not all have concurred in the act; so if one of a firm of commission merchants sells goods consigned to the firm, fraudulently, or in violation of the agreement, all the partners are liable. *Castle v. Bullard*, 23 How. (U. S.) 172 (189), citing Story on Part., § 166; *Nicoll v. Glennie*, 1 Maule & Selw. 568; *Olmsted v. Hoteling*, 1 Hill, 318. The latter case holds that it does not lie with one to claim property through the fraudulent act of another, whether as agent or partner, without being affected by that act in a civil action the same as if it were his own.

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All partners are liable for the frauds committed by either in the transaction and prosecution of the partnership enterprise. It is well settled that the firm is bound for the tort committed by one partner in the course of the transactions in business of the partnership, even when the other partners have not the slightest connection with, or knowledge of, or participation in the fraud. *Chester v. Dickerson*, 54 N. Y. 1 (11), citing *Griswold v. Haven*, 25 N. Y. 595.

It is elementary law that all partners are chargeable and legally responsible for the fraud perpetrated by one of their number in the transaction of the partnership business and the conduct of partnership affairs. *Bradner v. Strang*, 89 N. Y. 299 (306.)

The principle of agency applies to copartners; but it is only when it can be seen that a partner is, in fact, acting as an agent of his copartners, that he binds them. In *Lindley on Part.* the doctrine of a copartner's liability is explained and is limited to cases where the partner, whose agency is relied upon, is acting on behalf of his firm. It is there said (p. 289): "Where one member is acting beyond his power, or is conducting a fraud on his partners, or is the person whose duty it is to give his firm notice of what he himself has done, in all such cases notice on his part is not equivalent to notice by them." *Bienestok v. Ammidown*, 155 N. Y. 47, 57, 58.

The act of one in a business which constitutes the subject-matter of the partnership is the act of the other partners. If one of two persons who are partners collects money and absconds with it that forms no defense to the other partner. *McFarland v. Crery*, 8 Cow. 253.

Where one partner acts for a firm in demanding and collecting illegal charges every member of the firm is liable for the damage. *Lockwood v. Bartlett*, 7 N. Y. Supp. 481, affirmed 130 N. Y. 340.

The principle underlying the liability of one partner for the tortious act of another is governed by principles of law of agency. Like the liability of a master for the tortious act of his servant, it is confined within the limits of the implied authority with which each partner is vested by virtue of the partnership relations. *Farrell v. Friedlander*, 63 Hun, 254, 18 N. Y. Supp. 215. The judge adds: "I cannot find any case which goes to the extent of holding that the malicious prosecution of offenders had been admitted to be

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within the power delegated to one partner as the agent of another." Citing *Mali v. Lord*, 39 N. Y. 381.

Where members of a firm, in their firm name, organize a corporation, each partner is liable for the misrepresentations and concealments of the others committed while engaged in the partnership enterprise. *Walker v. Anglo-American Mortgage & Trust Co.*, 72 Hun, 334, 25 N. Y. Supp. 432, citing *Getty v. Devlin*, 54 N. Y. 403.

A partner who holds money in his individual right in trust for another cannot subject the firm to an action for the money by applying it to the use of the firm without the knowledge or privity of the other members of the firm; otherwise, where it is applied with their knowledge or privity. *Shaffer v. Martin*, 25 App. Div. 501-506, 49 N. Y. Supp. 853, citing *Jacques' Assignee v. Marquand*, 6 Cow. 497.

In *McGarragher v. Gaskell*, 42 Hun, 451, where a journeyman blacksmith was injured by the careless act of one of the members of the firm, it was held that the copartners were liable, citing *Stroher v. Elting*, 97 N. Y. 102.

Where a firm took securities from one of its members as trustee, to secure a loan made to such member, in an action by the true owner against the firm, it was held that a recovery could be had upon the ground that the knowledge of the partner holding the securities was the knowledge of the firm; or, in any event, threw upon the firm the burden of showing good faith and absence of notice as to the ownership of the securities. *Randall v. Knevals*, 27 App. Div. 146, 50 N. Y. Supp. 748; affirmed, on opinion below, 161 N. Y. 632.

All the members of a firm are answerable for a tort committed by their agent within the scope of his authority in the sale of partnership property. *Locke v. Stearn*, 1 Metc. 560.

The general doctrine of the joint and several liability of joint principals for torts applies to partners. *Morgan v. Skidmore*, 55 Barb. 263.

For a case holding that partners are liable for the false representations of an agent in the purchase of goods for partnership purposes, see *Hunter v. Hudson River Iron & Machine Co.*, 20 Barb. 493.

It is held, however, that a fraudulent misrepresentation by a partner in the sale of his individual interest does not come within

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the above rule, as such a sale is not within the scope of the partnership business. *Chamberlin v. Prior*, 2 Keyes, 539, 1 Abb. Dec. 24. See, generally, Bates' Law of Partnership, § 464; Lindley on Partnership, 298; Parsons on Partnership, 150.

Laws of 1897, chap. 420, § 6, being chapter 51 of the General Laws, provides that every general partner is liable to third persons for all the obligations of the partnership jointly and severally with his general copartners.

ARTICLE XI.

PRIVATE CORPORATIONS.

At one time the fact that a corporation was a fictitious person was looked upon as an obstacle to holding such a party liable for torts. The theory seems to have been not that the corporation was incapable of doing wrong, but that it was not amenable to process. Bigelow on Torts, § 73; Pollock on Torts, 68.

Liability of corporations in tort may properly and logically be determined by the application of the law in relation to master and servant. The old idea that a corporation, being an artificial person created by a sovereign, and endowed with certain powers, and none other, could not commit an actionable tort, has long since been abandoned. To-day a corporation is liable for its wrongful acts to the same extent and under the same circumstances as a natural person. Erwin "Cases on Torts," 91; *Life & Fire Ins. Co. v. Mechanics' Fire Ins. Co.*, 7 Wend. 31.

A corporation is liable to the same extent and under the same circumstances as a natural person for the consequences of its wrongful acts, and for the acts and negligence of agents, while engaged as such. 2 Wait's Actions and Defenses, 337, citing *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Titus v. President, etc., Western Turnpike Co.*, 61 id. 237.

*The National Bank v. Graham*, 100 U. S. 699, Justice Swayne, in the prevailing opinion, says: "Corporations are liable for every wrong they commit. They are liable for the acts of their servants while engaged in the business of their principal in the same manner and to the same extent that individuals are liable under like circumstances." He adds, citing numerous authorities: "An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of

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its creation or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance, and for libel. In certain cases it may be indicted for misfeasance or nonfeasance touching duties imposed upon it in which the public are interested. Its offenses may be such as will forfeit its existence."

In *Denver & Rio Grande Ry. v. Harris*, 122 U. S. 597, it is held that a corporation is liable in a civil action for torts committed by its servants and done by its authority, whether express or implied; it is also held that punitive damages may be awarded if it appears that the defendant's officers and servants, in an illegal assault and battery, wantonly disturbed the peace of the community and endangered life. Citing authorities.

Corporations are civilly responsible for all torts which work injury to others by acts of omission or commission. *Goodspeed v. East Haddam Bank*, 22 Conn. 530; *Beach v. Fulton Bank*, 7 Cow. 509; *Dater v. Troy Turnpike Co.*, 2 Hill, 630.

The liability of a corporation for wrongful acts of its officers is determined by an application of the general rules of law that govern the relations of principal and agent as developed and applied to corporations acting solely through such agencies. *Jarvis v. Manhattan Beach Co.*, 148 N. Y. 652, and cases cited.

It is said in *New York & New Haven R. R. Co. v. Schuyler et al.*, 34 N. Y. 30 (49): "Another important legal proposition in the case is so clear upon principle, and so distinctly settled by authority, that nothing but confusion can flow from its discussion. It will bear no more than plain enunciation. A corporation is liable to the same extent and under the same circumstances as a natural person for the consequences of its wrongful acts, and will be held to respond in a civil action at the suit of an injured party for every grade and description of forcible, malicious, or negligent tort or wrong which it commits, however foreign to its nature or beyond its granted powers the wrongful transaction or act may be."

In *Fishkill Savings Institution v. National Bank of Fishkill*, 80 N. Y. 162, an action for conversion, it was held that a corporation is liable for its wrongful acts and omissions and for the acts of its agents, while engaged in the business of their agency, to the same extent and under the same circumstances as natural persons. Affirming 19 Hun, 354.

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A corporation may sue or be sued for libel, *Lubricating Oil Co. v. Standard Oil Co.*, 42 Hun, 153; for false imprisonment, *Lynch v. Metropolitan R. R. Co.*, 90 N. Y. 77; for malicious prosecution, *Morton v. Metropolitan Life Ins. Co.*, 34 Hun, 366, affirmed on opinion below, 103 N. Y. 645; *Scott v. Dennett Surpassing Coffee Co.*, 51 App. Div. 321, 64 N. Y. Supp. 1016; *Willard v. Holmes*, 142 N. Y. 492; for conspiracy, *Buffalo Lubricating Oil Co. v. Standard Oil Co.*, 106 N. Y. 669; for fraud and deceit, *Cragie v. Hadley*, 99 N. Y. 131, where it is said that there is more difficulty in showing a fraud against a corporation than against an individual; that this arises from the difficulty in many cases of determining whether the fraud charged is imputable to the corporation, but that "in its relation to the public it is represented by its officers and agents, and their fraud in the course of the corporate dealings is, in law, the fraud of the corporation."

In *Morton v. Metropolitan Life Ins. Co.*, 34 Hun, 366, it is said in the opinion that actions for libel, for assault and battery, and for trespass have been successfully prosecuted against corporations and a recovery upheld by the courts.

It seems a corporation cannot be held under this rule for slanderous words uttered by one of its officers or agents — citing Townshend on Slander and Libel, and Odgers on Libel and Slander; that a corporation cannot be guilty of slander, that it has not the capacity for committing that wrong, even though the officer uttering the slanderous words be acting honestly for the benefit of the company, and within the scope of his duties, unless it can be proved that the corporation expressly ordered and directed the officer to say those words, since a slander is a voluntary tortious act of the speaker. *Eichner v. Bowery Bank*, 24 App. Div. 63, 48 N. Y. Supp. 978.

The law supposes that a corporation promises or undertakes to do its duty, and subjects it to answer in a proper action for its defaults, whether of nonfeasance or misfeasance. *McEntee v. Kingston Water Co.*, 165 N. Y. 27 (32), citing *Bank of Columbia v. Patterson*, 7 Cranch, 290, 306, opinion of Mr. Justice Story, that when a corporation is acting within the scope of the legitimate purposes of its business, all duties imposed upon it by law may be enforced by action.

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**ARTICLE XII.****MUNICIPAL AND QUASI-MUNICIPAL CORPORATIONS.**

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**SUBDIVISION 1.****Authorities on Liability of Municipal Corporations.**

The vexed questions presented by liability of municipal corporations upon contracts and for torts has given rise to several valuable treatises on the subject. Foremost among the number is the work of Judge Dillon, which reached its fourth edition in 1890, and is recognized as easily the leading authority. Beach Commentaries on the Law of Public Corporations was published in 1893, followed by Tiedman on Municipal Corporations in 1894. Williams on the Liability of Municipal Corporations for Tort was published in 1901. The most recent work is in two volumes, Smith on the Modern Law of Municipal Corporations, 1903. Jones on Negligence of Municipal Corporations is, as appears by its title, restricted to the liability of such corporations relative to a single branch of the law of torts.

**SUBDIVISION 2.****Distinction Between Municipal and Quasi-Municipal Corporations.**

Judge Dillon says (§ 26), that there is a marked line of distinction between the liability of a quasi-municipal and a municipal corporation; hence it is necessary to consider the difference in character between the two public corporations thus designated. Counties, towns, and school districts, as well as the State itself, are said to be quasi-corporations. Williams, § 2; Tiedman, §§ 4, 5.

Quasi-corporations are territorially and politically sections of

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the State solely for public and governmental purposes. They are simply the agencies or auxiliaries that the State has established for the purpose of aiding in the general administration of the State government. Williams, § 3.

A municipal corporation is, as its name implies, an incorporation, or body politic, created by an act of law as an instrument of government over a particular community, and over the people located there. In its corporate capacity it is authorized to exercise specific subordinate powers of legislation and regulation with respect to local and internal concerns. This power of local government is a distinguishing feature of the municipal corporation proper. It is to be distinguished from counties and other subdivisions of the State in that the county is simply a territorial subdivision of the State government, and subject to the special control of such State government in the administration of all of its affairs. Tiedman, § 3; Dillon on Municipal Corporations, § 20.

The main distinction between corporations, like counties, and municipal corporations proper, such as cities, seems to be the absence of an act of incorporation in the case of towns and counties, so that they are only quasi-corporations. Tiedman, § 3.

This subject is fully treated, and this class of corporations classified and distinguished. Dillon, §§ 18-31.

There are two classes of public corporations known to the common law as quasi-corporations and municipal corporations, respectively, subdivisions of State territory, such as counties, townships, school districts, and like bodies created by the legislature for public purposes, and which are simply agencies or auxiliaries that the State has established for the purpose of aiding in the general administration of the State government; such corporations are not amenable at the suit of an individual for wrongs or for misfeasance or nonfeasance in the performance of duties cast upon them, unless the liability is expressly created by statute. They are corporations of the very lowest grade and invested with the simplest amount of power. Municipal corporations — so called at common law — including cities and villages, are not simply local branches of the State government, but have greater powers and duties. Their liability is much greater than that of the quasi-corporation; they have more extensive powers and privileges, and represent their inhabitants in a much wider sense, performing duties that pertain to the exercise of private franchises, powers,



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and privileges. Williams on Municipal Liability, §§ 2, 3, and 4; Dillon on Municipal Corporations, §§ 948, 997, 998; *Russel v. Men of Devon*, 2 T. R. 308; *Barnes v. District of Columbia*, 91 U. S. 540 (552), citing *Conrad v. Ithaca*, 16 N. Y. 158; *Weet v. Brockport*, 16 N. Y. 163; *Bailey v. Mayor*, 3 Hill, 531; *Mayor, etc. v. Bailey*, 2 Den. 433.

In *Monk v. Town of New Utrecht*, 104 N. Y. 552, it is said that there is a manifest difference as to the liability of cities and villages, on the one hand, and towns and counties on the other, arising out of the charter provisions and obvious requirements of the situation as to their obligation.

At common law, a distinction existed between the terms "municipal corporation" and "quasi-corporation," the former being applied to incorporated cities and villages, the latter to towns and counties. *Hughes v. County of Monroe*, 147 N. Y. 49.

In 1892, chapter 685 of the General Laws, being the General Municipal Law (§ 1), provided that the term "municipal corporation" as used in that chapter should include "only a county, town, city, and village;" chapter 686 of the same year, the County Law (§ 2), defines a county as a municipal corporation. The Town Law of the same year, chapter 20 of the General Laws, also defines a town as a municipal corporation. It is held, however, that the provisions of the County Law referred to (§§ 2 and 3), declaring a county to be a municipal corporation, and that an action "to recover damages for any injury to any property and right for which it is liable" shall be in the name of the county, import no further liability on the part of the county than that which existed at their enactment. Hence, the distinction remains substantially as above indicated as between liability of towns and counties, on the one hand, and cities and villages, on the other. *Markey v. County of Queens*, 154 N. Y. 675.

### SUBDIVISION 3.

#### Quasi-Municipal Corporations, Liability of, for Torts.

In the absence of statute expressly creating it, no liability for the nonperformance or negligent performance of the purely public duties which are imposed upon municipal corporations as part of the sovereign power of the State attaches to quasi-municipal corporations. Tiedman, § 325.

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Quasi-corporations are not liable for negligence or misfeasance in the performance of the duties thrust upon them, unless such liability is expressly created by statute. Williams, § 3. Towns are political divisions of the State organized for the convenient exercise of portions of the powers of the State. Its officers are not its agents so as to bind it by a negligent or improper discharge of their duties. *Barber v. Town of New Scotland*, 88 Hun, 524, 34 N. Y. Supp. 968, citing *Lorillard v. Town of Monroe*, 11 N. Y. 392; *Ward v. Town of Southfield*, 102 N. Y. 287 (295); *People ex rel. Van Keuren v. Board of Town Auditors*, 74 N. Y. 310 (315); *People ex rel. Loomis v. Board of Town Auditors*, 74 N. Y. 310; *People ex rel. Everett v. Board of Supervisors*, 93 N. Y. 397; *People ex rel. Morey v. Town Board of Oyster Bay*, 175 N. Y. 394. It will be noted that this strict rule of the common law has been changed to a limited extent by statute as to the care of highways. The history of legislation on this subject is briefly traced. 88 Hun, 524, *supra*.

The limitation of liability of quasi-corporations is considered in *Wells v. Town of Salina*, 119 N. Y. 280, in connection with their right to contract. It is there held that the powers of towns, and it seems of other municipal corporations organized for governmental purposes, are limited and defined by the statutes under which they exist, and they possess only such powers as are expressly conferred by statute or necessarily implied. Citing authorities in this and other States.

Counties possess quasi-corporate powers, but they are mere trustees of the public rights and powers conferred upon them as the agents of the State. Their corporate capacity is superimposed upon them by the sovereign power. They are auxiliary to the government of the State, and discharge the functions imposed upon them in matters of taxation and local government as representatives of the central and supreme authority. *Cayuga County v. State*, 153 N. Y. 279, opinion Andrews, Ch. J., p. 289, citing *Darlington v. Mayor*, 31 N. Y. 164 (196).

A county, while engaged in the discharge of a public duty such as caring for the insane, is a quasi-corporation as to liability for the negligence of its agents in connection therewith. *Hughes v. County of Monroe*, 147 N. Y. 49, citing numerous authorities at p. 57. In the principal case it is pointed out that this rule does not prevent an action against specific officers committing a wrong-

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ful act — as the board of supervisors and officers in control of public buildings.

Counties and towns, being the civil divisions of the State, are not subject to actions, except in so far as the statute law has given them corporate capacity, with the right to sue and be sued, and are not liable in a corporate capacity unless a liability is imposed upon them by statute. *Markey v. County of Queens*, 154 N. Y. 675 (686).

A county which owns and maintains for public purposes a penitentiary, almshouse, and farm used therewith, acts in a governmental capacity, and is not liable for the acts of the officers controlling them in allowing a nuisance, and an action cannot be maintained against the county therefor. *Le Frois v. County of Monroe*, 162 N. Y. 563.

The question as to whether a municipal corporation had funds at its command, and more particularly a quasi-municipal corporation, was at one time regarded as of considerable importance. See *Hutson v. Mayor*, 9 N. Y. 162; *Todd v. City of Troy*, 61 N. Y. 506; *Hunt v. Mayor of New York*, 109 N. Y. 134; *Monk v. Town of New Utrecht*, 104 N. Y. 552. But the tendency of the latter authorities is to hold that even if the necessary funds are not in the treasury, the corporation having the power to raise them by taxation or otherwise is liable. In any event the burden of showing insufficient funds is upon the defendant, and is only available in the case of quasi-corporations. This question rises usually with reference to negligence by towns in failing to repair highways.

## SUBDIVISION 4.

## Municipal Corporations Proper, Liability of, for Torts.

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§ 1. **General rule as to municipal liability.**—When there is no express or implied statutory municipal liability for tort, and a plain municipal duty has been violated with a consequent damage to some one's person or property, there is no general rule by which it can be decided in every case whether a civil action will lie. Tiedman, § 324, citing 2 Thompson on Negligence, chap. 16.

Judge Dillon says (§ 983) that the American cases, in his opinion, fully support the rule which he lays down (§ 980), as follows: "*Where a given duty is a corporate one, that is, one which rests upon the municipality in respect of its special or local interests and not as a public agency, and is absolute and perfect and not discretionary, or judicial in its nature, and is one owing to the plaintiff or in the performance of which he is specially interested, the corporation is liable in a civil action*" for its failure.

Cities and villages, being corporations created by the legislature, may be sued as such, in any of the courts of the State having jurisdiction of the subject-matter. *Port Jervis Water Works Co. v. Port Jervis*, 151 N. Y. 111, affirming s. c., 71 Hun, 66, 24 N. Y. Supp. 497.

That a municipal corporation may commit an actionable wrong and become liable for a tort is beyond dispute. *Speir v. City of Brooklyn*, 139 N. Y. 6 (12).

It is necessary in order to establish liability of a municipal corporation for damages, to show that the act complained of was within the scope of the corporate powers. If outside of the powers of the corporation conferred by statute, the corporation is not liable, whether its officers directed the performance of an act, or it was done without any express direction. *Smith v. City of Rochester*, 76 N. Y. 506.

A municipal corporation does not insure the citizen against damage from works of its construction. Its obligation and duty in such respect is measured by the exercise of reasonable care and vigilance. Liability can only be predicated upon its neglect or misconduct. *Jenney v. City of Brooklyn*, 120 N. Y. 164 (167),

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citing *McCarthy v. City of Syracuse*, 46 N. Y. 194; *Smith v. Mayor, etc.*, 66 N. Y. 295; *Ring v. City of Uohoes*, 77 N. Y. 83; *Hunt v. Mayor, etc.*, 109 N. Y. 134.

§ 2. **Specific rule cannot be formulated.**— Few questions have given rise to more diversity of judicial opinion or greater conflict in judicial decisions than that of the liability of municipal corporations for the acts of their officers or servants. In every State in this country, as far as we know, that follows the common law, distinction is drawn between the class of cases in which the municipality is held liable for the torts of its agents and those in which it is held exempt. But not only the grounds on which the distinction is placed, but the line of cleavage itself between liability and nonliability differs greatly in different jurisdictions. Which distinction is the sound one, and whether any distinction will logically stand the test of final analysis, has been questioned. Nevertheless, in this State the rule governing the liability or nonliability of a municipal corporation has for the past twenty-five years been settled by an unbroken line of authority, although there have been at times differences of opinion as to the application of the rule.

Judge Dillon states (§ 948) that he finds it impossible to state by way of definition any rule sufficiently exact to be of much practical value which will *precisely embrace the torts for which a civil action will*, in the absence of a statute declaring the liability, lie against a municipal corporation, citing language of *Lloyd v. New York*, 5 N. Y. 369 (375): "All that can be done with safety is to determine each case as it arises." He then states that it is clear that such a corporation cannot be held liable for failing to exercise its discretionary powers of a public or legislative character, or for the manner in which in good faith it does exercise those powers, citing *Wilson v. New York*, 1 Den. 595; *Seifert v. Brooklyn*, 101 N. Y. 136; *Griffin v. Mayor*, 9 N. Y. 456; *Seaman v. New York*, 80 N. Y. 239. Nor for failure to enforce by-laws. *Levy v. New York*, 1 Sandf. 465, affirmed in 11 N. Y. 396, 9 N. Y. 456 (459).

Williams (§ 1) says the impossibility of framing any general proposition which will include all the torts for which public corporations have been held responsible in a private action at common law appears to be conceded by both judges and text-writers.

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He adds that there are three considerations which are of primary importance: *First*, the character of the corporate body which is sought to be charged (whether it is a quasi corporation or municipal corporation proper a question considered under subd. 1) *Second*, the nature of the duty from which the tort resulted. *Third*, the means at the command of the corporation for the performance of that duty. At sections 8 and 10 the same author lays down the rule (citing *Smith v. Mayor of New York*, 66 N. Y. 295 to the propositions) that at common law no obligation rests on such a corporation to perform its private and corporate duties absolutely and at all times, and that its powers are limited to those expressly conferred by the State or necessarily incident thereto.

In *Peaty v. City of New York*, 33 Misc. Rep. 231, 67 N. Y. Supp. 276, will be found an opinion of Justice Gaynor, the syllabus of which reads as follows: "A history and review of the decisions in this State on the liability and nonliability of municipal corporations for negligence in governmental matters intrusted to them, and their inconsistency pointed out."

§ 3. **A distinction between political and corporate duties of municipality.**—As to the liability of municipalities in the strict sense of the term, a distinction exists as to their liability for acts in different capacities. In *Mayor v. Bailey*, 2 Den. 431, Judge Nelson, at p. 539, speaking of the distinction between powers granted exclusively for public purposes, and those granted for private advantage, says that it is "quite clear and well settled, and the process of separation is practicable. To this end regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common advantage therefrom, the corporation *quoad hoc* is to be regarded as a private company."

In *Maxmilian v. Mayor*, 62 N. Y. 160, it is said (170): "It is not always easy to say within which class a particular case should be placed. But when it is determined that the power and duty are given and taken for the benefit of the corporation as a corporate body, and the act to be done is to be done by it through agents

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of its appointment and under its control and power of removal, there is no doubt of its liability for negligent omission or negligent attempt at performance. When the powers created and duly enjoined are given and laid upon officers to be named by the corporation, but for the public benefit and as a convenient method of exercising a function of general government, and the corporation has no immediate control nor immediate power of removal of those officers, nor of their subordinates and servants, then it is not liable for their negligent omission or action."

Municipal corporations are bound to see that all duties which are ministerial, and which are absolutely imposed upon them by virtue of their being municipalities, and undertaken by them, are performed with reasonable care and prudence, and are liable to the same extent as an individual would be. *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 463; *Storrs v. City of Utica*, 17 N. Y. 104; *Lloyd v. City of New York*, 5 N. Y. 369; *Barton v. City of Syracuse*, 36 N. Y. 54; *Davenport v. Ruckman*, 37 N. Y. 568; *Requa v. City of Rochester*, 45 N. Y. 129; *McCarthy v. City of Syracuse*, 46 N. Y. 194; *Noonan v. City of Albany*, 79 N. Y. 470; *Saulsbury v. Village of Ithaca*, 94 N. Y. 27.

It is the universal rule that municipal corporations, although there is no statute expressly creating liability, are bound to see that all purely ministerial duties undertaken by them are performed with reasonable care and prudence, and are responsible in damages for any failure so to perform them, to the same extent as a business corporation or a private individual would be in like circumstances. *Nelson v. Village of Canisteo*, 100 N. Y. 89, citing *Conrad v. Ithaca*, 16 N. Y. 159; *Weet v. Brockport*, 16 N. Y. 161; *Saulsbury v. Ithaca*, 94 N. Y. 27, cited in *Pettengill v. City of Yonkers*, 116 N. Y. 558 (564); *Wilson v. City of Troy*, 135 N. Y. 96 (102); *Seymour v. Village of Salamanca*, 137 N. Y. 364 (368).

A municipality can perform its functions only through officers or agencies; it is not responsible for the misconduct or neglect of officers or departments created and invested with powers for public purposes, as distinguished from those for the purposes of the corporation. *Bieling v. City of Brooklyn*, 120 N. Y. 98 (106).

The distinction between public and private powers of municipal corporations has been the subject of frequent judicial dis-

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cussion. In *Fire Ins. Co. v. Village of Keeseville*, 148 N. Y. 46 (52), Judge Gray, speaking for the court, says: "When we find that the power conferred has relation to public purposes and is for the public good, it is to be classified as governmental in its nature and it appertains to the corporation in its political character. But when it relates to the accomplishment of private corporate purposes, in which the public is only indirectly concerned, it is private in its nature, and the municipal corporation, in respect to its exercise, is regarded as a legal individual. In the former case, the corporation is exempt from all liability, whether for nonuser or misuser; while in the latter case it may be held to that degree of responsibility which would attach to an ordinary private corporation. Then, the investiture of municipal corporations by the legislature with administrative powers may be of two kinds. It may confer powers and enjoin their performance upon the corporation as a duty; or it may create new powers to be exercised as governmental adjuncts and make their assumption optional with the corporation." Citing *Bailey v. The Mayor*, 3 Hill, 531; *Lloyd v. The Mayor*, 5 N. Y. 369; *Maxmilian v. The Mayor*, 62 N. Y. 160, and *Darlington v. The Mayor*, 31 N. Y. 164.

In *Maxmilian v. Mayor*, 62 N. Y. 160, there was stated the broad general doctrine that two kinds of duties are imposed on municipal corporations — the one, governmental and a branch of the general administration of the government of the State; the other, quasi private or corporate; that in the exercise of the latter duties the municipality is liable for the acts of its officers or agents, while in the former it is not. *Lefrois v. County of Monroe*, 162 N. Y. 563 (566).

§ 4. **Liability for acts of officers and agents.**— A municipality as a superior or employee occupies a somewhat unique position; the question appears to be what was the nature of the duty in the performance of which the negligent agent or officer was engaged at the time of the injury or damage. Was it a public governmental duty imposed by the legislature upon such official when selected by the corporation, or was it a private municipal duty undertaken for the emolument of, and under the full control of, the corporation. It is a universal rule that, if the duty was of the former class, the relation of superior and



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agent does not exist, and consequently the maxim, *respondet superior*, does not apply, but otherwise if the duty falls within the latter class. Williams, p. 27.

A municipal corporation cannot be held liable for the wrongful or negligent acts of any public officers or their employees, whose duties are prescribed by statute, who are not under the supervision nor subject to the control of the corporation, and whose functions do not inure to the corporate benefit, although they be elected or appointed by the corporation. Parker & Worthington on Public Health and Safety, § 161.

In *N. Y. & Brooklyn Saw Mill & Lumber Co. v. City of Brooklyn*, 71 N. Y. 580, Chief Judge Church, in the opinion of the court, says (p. 583): "The subject of municipal liability for the nonfeasance or misfeasance of its officers or agents has given rise to extensive litigation, and the distinctions recognized by some of the authorities, and the apparent conflict between others, renders it often difficult to determine in a given case to what class it belongs. There are, however, some general principles to which it may be proper to advert which seem to be established by the authorities:

*First.* When, by a municipal charter in the distribution of powers and duties among the different municipal officers, duties of a public character are imposed, the officers are regarded as agents of the corporation, and it is liable for their acts or omissions. This has been held to be based upon an implied agreement, upon the consideration of the grant of franchises, and which agreement inures to the benefit of every individual interested in its performance. (*Conrad v. Trustees, etc.*, 16 N. Y. 158, and note.)

*Second.* A municipal corporation is held liable for the acts of an agent it employs to do business for its own corporate or private benefit, the same as a private individual, and this, although the agent may be appointed by the legislature, or under legislative authority, if it accepts and ratifies the appointment. (*Appleton v. Water Comrs.*, 2 Hill, 433.)

*Third.* When a ministerial duty is expressly imposed upon a municipal corporation by legislative enactment, in the performance of which the public are interested, it may be held liable, although the circumstances are such that an implied acceptance of the particular provisions may not be inferred."

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It has been repeatedly held that a municipality is not liable for the acts or omissions of an officer in respect to a duty specifically imposed, which is not connected with his duties as agent of the corporation. The general rule is that a municipal corporation is only liable for the omissions or acts of officers in the performance of duties imposed upon the principal. *Martin v. Mayor of Brooklyn*, 1 Hill, 545; *Russell v. Mayor of New York*, 2 Den. 461; *People v. Supervisors of Chenango County*, 11 N. Y. 563; *Owens v. Missionary Society of M. E. Church*, 14 N. Y. 380.

Where an act is *ultra vires*, so as not to be within the scope of the corporate powers of a municipality, it will not be answerable for the consequences resulting, though the persons causing the work to be done were its officers or agents and assumed to act as such in doing it. *Stoddard v. Village of Saratoga Springs*, 127 N. Y. 261 (267).

Because the duties of municipal officers are regulated by statute, the municipality of which they are officers is not responsible for their misfeasance or nonfeasance, except in cases where they act as the agents of the municipality in the discharge of duties imposed by law upon them. *People ex rel. Sherwood v. Board of Canvassers*, 129 N. Y. 360 (368), citing *Lorillard v. Town of Monroe*, 11 N. Y. 392, where it was held that assessors and collectors are not in a legal sense the agents of the town in its corporate capacity, in the assessment and collection of taxes, and the town is not responsible for any mistake or misfeasance by them in the performance of their duties.

Liability of a municipal corporation for the acts of servants or agents depends on the character of the service. If a corporation appoints or elects and controls them in the discharge of their duties; if it can continue or remove them or hold them responsible for the manner in which they discharge their duties, and if their duties relate to the exercise of corporate powers, and are for the peculiar benefit of the corporation in its local or special interest, they may be regarded as its servants, and the maxim *respondeat superior* applies. But if they are elected or appointed by the corporation in obedience to a statute, to perform a public service, not local or corporate, but because this mode of employment has been deemed expedient, by the legislature in the distribution of the powers of government, they are not to be regarded as the servants of the corporation, but as public or State officers, with such

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powers and duties as the statute confers upon them, and the doctrine of *respondeat superior* does not apply. *Woodhull v. The Mayor*, 150 N. Y. 450 (454).

Upon the question of liability of municipal corporation for acts of its officers or employees, Judge Folger, in *Maxmilian v. Mayor*, 62 N. Y. 160, says, the practical question is, "Are the acts that are to be done by the officers in question, acts to be done by them in their capacity of public officers in the discharge of duties imposed upon them by the legislature for the public benefit; or are they acts done for the defendant, in what may be called its private character, in the management of property or rights voluntarily held by it for its own immediate profit or advantage as a corporation, though inuring ultimately to the benefit of the public?"

To entitle one to recover against a city for a wrong it must be shown that the acts of the officer doing it were authorized by the corporation, or had been subsequently ratified by it in such a manner as to make it liable therefor *ab initio*. *Everson v. City of Syracuse*, 100 N. Y. 577 (582), holding that the city was not liable for the tortious act of an officer in the collection of a tax.

§ 5. **Not responsible for acts involving discretion.**—Legislative and judicial duties include all those duties of a municipal corporation that involve deliberation, judgment, and discretion in their exercise, whether its purpose is the accomplishment of purposes public and governmental, and private and municipal, and as to such duties the corporation is not bound in the first instance to act at all, nor is it, if it proceeds to act, liable for negligence in their performance. Williams, p. 12.

In *Wilson v. Mayor of New York*, 1 Den. 595, Mr. Justice Beardsley says (p. 599), in holding that the city of New York was not liable to actions for injuries done in the exercise of its authority to direct the grading of streets: That it is not the duty of the corporation to make every sewer and drain which may be desired by individuals, or which a jury might even find to be necessary and proper; that no imperative duty rests upon them to open any new drain whatever; that they have discretion on the subject and must necessarily decide when and where such works shall be made.

The selection of proper means and the adoption of plans by which judicial and discretionary powers are to be executed by a

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municipal corporation involve the employment of deliberation and discretion, and the honest and faithful exercise of these attributes is not subject to review by the courts of law in a private action, brought by one alleging the injury to have been caused thereby. Tiedman on Municipal Corporations, § 328, citing *Lynch v. Mayor of New York*, 76 N. Y. 60; *Monk v. New Utrecht*, 104 N. Y. 552. In the latter case it is said, in the opinion of Ruger, Ch. J. (p. 561), in considering the construction of the roadway, that "All questions as to the feasibility and safety of the road selected, and of the security of the plan of structure to be adopted, were devolved by statute upon the commissioners charged with the work of making said plans, and the duty of determining these questions was fairly judicial in its nature upon the body authorized to perform it."

In *Lynch v. Mayor*, 76 N. Y. 60, it is held that a municipal corporation may exercise its discretion subject to no review or question in any court, whether at any particular place it will build a sewer, and what water it will conduct into an existing sewer, and what drains it will connect therewith.

As to the exercise of judicial or discretionary power in the making of improvements, in *Seifert v. City of Brooklyn*, 101 N. Y. 136, Chief Judge Ruger says (at p. 143): "The exercise of a judicial or discretionary power, by a municipal corporation, which results in a direct and physical injury to the property of an individual, and which from its nature is liable to be repeated and continuous, but is remediable by a change of plan, renders the corporation liable for such damages as occur in consequence of its continuance of the original cause after notice, and an omission to adopt such remedial measures as experience has shown to be necessary and proper."

All that is required of a municipal corporation in building a sewer is that it shall adopt a plan of construction reasonably calculated to meet the needs of the present and of the future so far as they can be reasonably anticipated. If it performs this duty and thereafter properly maintains the sewer, it is not liable for injuries to property resulting from the overflow of the sewer occasioned by rain storms of extraordinary violence. *Sundheimer v. City of New York*, 77 App. Div. 53, 79 N. Y. Supp. 278, distinguishing *Talcott v. City of New York*, 58 N. Y. 514, 69 N. Y. Supp. 360; *Seifert v. City of Brooklyn*, 101 N. Y. 136.

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A municipal corporation is not liable to a private action for damages accruing for not providing sufficient sewerage for draining plaintiff's premises. This duty, although not a judicial one, is of a judicial nature, requiring qualities of deliberation and judgment. *Mills v. City of Brooklyn*, 32 N. Y. 489.

"In the construction and maintenance of a sewer or drainage system, a municipal corporation exercises a part of the governmental powers of the State for the customary local convenience and benefit of all the people; and in the exercise of these discretionary functions the municipality cannot be required to respond in damages to individuals for injury to health, resulting either from omissions to act, or the mode of exercising the power conferred on it for public purposes to be used at discretion for the public good." *Hughes v. City of Auburn*, 161 N. Y. 96.

"A municipal corporation is not chargeable with such negligence in the selection of a route or the adoption of a plan for a sewer as will render it liable for consequential damages not caused by willful misconduct to the property of an abutting owner, produced by the settling of the ground in front of his premises, due to the work of construction, when the sewer was lawful, was duly authorized by statute, and the route selected was a proper one, and the plan adopted had been in general use for years, was carefully prepared to protect both public and private interests, and was reasonably safe." *Uppington v. City of New York*, 165 N. Y. 222.

In *Paine v. Village of Delhi*, 116 N. Y. 224, at p. 228, the language of Miller, J., in *Urquhart v. City of Ogdensburgh*, 91 N. Y. 67, is cited with approval as follows: "The rule is well settled that where power is conferred on public officers or a municipal corporation to make improvements, such as streets, sewers, etc., and keep them in repair, the duty to make them is quasi-judicial or discretionary, involving a determination as to their necessity, requisite capacity, location, etc., and for a failure to exercise this power, or an erroneous estimate of the public needs, no civil action can be maintained, but when the discretion has been exercised and the street or improvement made, the duty of keeping it in repair is ministerial, and for neglect to perform such a duty an action by the party injured will lie."

Where the duty violated is purely judicial, no action lies for misconduct or delinquency, however gross, even if corrupt motives

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are charged. The same principle prevails where the party on whom the duty devolves, though not a judge, is clothed with discretionary powers, to be exerted or withheld according to his sense of fitness and propriety. When the power to make certain improvements in a city is discretionary, a private action cannot be maintained against the corporation for an omission to construct a particular improvement. *Wilson v. Mayor of New York*, 1 Den. 595.

§ 6. **Liability for streets and highways.**— It is said in Williams on Municipal Liability, § 70, that the practical result of the consideration by the courts, as to liability of municipality for defects in highways, may be summed up in the statement that the courts of last resort, in most of the States, have enforced the doctrine that municipal corporations proper are responsible at common law for injuries arising from their neglect to keep the streets reasonably safe for public travel.

The theory on which cities and villages were first held liable for defects in highways is, not merely that they are corporations, but that they obtain valuable franchises, and in consideration therefor undertake to perform with fidelity their charter obligation. Although this may be fiction, the principle is too well settled in the law to be ignored. This principle is not applicable to counties, which, while the statute may make them municipal corporations, they are something more than that — they are political divisions of the State; and while the State doubtless can impose upon counties liability for neglect to perform local duties, it is necessary that there should be positive legislation to accomplish that purpose. *Albrecht v. County of Queens*, 84 Hun, 399, 32 N. Y. Supp. 473; *People ex rel. Martin v. Westchester County*, 57 App. Div. 135, 67 N. Y. Supp. 91; *Godfrey v. County of Queens*, 89 Hun, 18, 34 N. Y. Supp. 1052.

A municipal corporation having the power of maintaining and controlling all streets is bound to exercise ordinary and reasonable care and diligence, and see that they are kept reasonably safe. *Nelson v. Village of Canisteo*, 100 N. Y. 89 (93).

A city in the ordinary and usual care of its streets, both as to repairs and cleanliness, acts in the discharge of the special power granted it by the legislature, in the exercise of which it is a legal individual, as distinguished from its governmental functions

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when it acts as a sovereign. So held in an action brought to recover damages for the death of a child, who was run over and killed by a horse attached to an ash cart of the street-cleaning department of the city of New York. *Missano v. Mayor*, 160 N. Y. 123.

The opinion of Bartlett, J., collates and discusses the authorities upon this subject, distinguishing *Maxmilian v. The Mayor*, 62 N. Y. 160, where it was held that a person struck and run over by an ambulance driven by an employee of public charities and correction could not recover. The latter case was followed, *Lefrois v. County of Monroe*, 162 N. Y. 563.

In *Quill v. The Mayor*, 36 App. Div. 476, 55 N. Y. Supp. 889, Justice Cullen also considers the authorities bearing upon this question, holding the same rule as that enunciated in the *Missano* case, that the removal of ashes and garbage is a private duty of the municipality, and that the city is liable to one who has sustained personal injuries because of the negligence of the driver of the ash and garbage cart belonging to the street-cleaning department.

Tiedman says that the city is bound to repair streets when the failure to do so menaces the safety of public travel. Tiedman, § 342; *Weet v. Brockport*, 16 N. Y. 161 *Davenport v. Ruckman*, 37 N. Y. 568.

This duty to repair is comprehensive and includes the removal of obstructions. *Goodfellow v. New York*, 100 N. Y. 15. Sticks of lumber, logs, and the like. *Gorham v. Cooperstown*, 59 N. Y. 660. A pile of ashes. *Ring v. Cohoes*, 77 N. Y. 83.

It is settled by a long line of decisions in this State that municipal corporations proper, having the powers ordinarily conferred upon them respecting streets within their limits, owe to the public the duty to keep them in safe condition for use in the usual mode by travelers, and are liable in a civil action for special injury resulting from neglect to perform this duty. *Ehrgott v. Mayor, etc., of City of New York*, 96 N. Y. 271.

The erection of necessary barriers, railings, signs, and lights. *Kennedy v. Mayor*, 73 N. Y. 365; *Hubbell v. Yonkers*, 104 N. Y. 434. The removal of ice or snow within a reasonable time after the same has accumulated. *Taylor v. Yonkers*, 105 N. Y. 202; *Kinney v. Troy*, 108 N. Y. 567.

The liability of municipality for care of streets arises in almost

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every instance in actions for negligence or nuisance. The general rule as to the duty of municipal corporations to care for the streets and sidewalks is well settled; but the application of the rule has given rise to much litigation in actions of the character referred to, more particularly in connection with the liability of the cities for accidents arising from failure to remove ice and snow from the sidewalks. Some of the later authorities upon that subject are, *Lichtenstein v. Mayor*, 159 N. Y. 500, holding that the duty of the city to keep its walks free from ice and snow does not require it also to clear that part of the roadway that is so near those walks that a traveler may step upon it to avoid a pool of water; that the city is not bound to remove from the roadway or bed of the street ridges of snow accumulated from clearing of sidewalks. That the law does not impose upon the municipality the duty of foreseeing that water may accumulate on the walk, and that a traveler, in avoiding it, may be injured by stepping upon a ridge of snow cast from the walk into the roadway.

*Tremley v. Harmony Mills*, 171 N. Y. 598, holds that a property-owner who negligently maintains a leader from the roof of a building so as to discharge water on the sidewalk, by which ice is accumulated thereon and the walk rendered dangerous, is liable in damages to any person who is injured thereby. This is based upon the ground that the municipality would be liable under such circumstances.

A very full and exhaustive citation of authorities upon the liability of a municipal corporation as to its nature and extent will be found in the brief of appellant in *Danaher v. City of Brooklyn*, 119 N. Y. 241, where it is held, opinion Earl, J. (p. 254), that the liability of a corporation that its streets or other constructions shall be in safe and proper condition extends only to the exercise of reasonable care and diligence.

§ 7. **Liability for acts of boards or departments.**—In *Tormey v. The Mayor*, 12 Hun, 542, the rule is laid down: "Although where a board or department of a city government is created by legislative enactment, and is not subject to the control or direction of the city government, the latter deriving no pecuniary benefit from the existence of the former, the city government is not responsible for damages occasioned by the negligence and malfeasance of the former; yet where the city does derive a



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benefit from the existence of the board, and its employees participate in the wrong, by which the injury is occasioned, it is liable therefor."

To determine where there is municipal responsibility, the inquiry must be, whether the department whose misfeasance or non-feasance is complained of is a part of the machinery for carrying on the municipal government, and whether it was at the time engaged in the discharge of a duty, or charged with a duty primarily resting upon the municipality. *Ehrgott v. Mayor*, 96 N. Y. 264 (273), citing and collating numerous authorities.

In *Fire Ins. Co. v. Keeseville*, 148 N. Y. 46, *supra*, an action was brought for negligence on the part of the defendant for failing to keep its water works and fire appliance in working order, and failing to employ competent men to manage and care for the same. It was held, reversing 80 Hun, 162, 29 N. Y. Supp. 1130, that the grant of power to maintain a system of water works was exclusively for public purposes belonging to the corporation in its public, political, or municipal character, and that the corporation was not liable at the suit of a citizen. Cited *Hughes v. City of Auburn*, 161 N. Y. 96, holding that an individual who, without any invasion of his property rights, suffered from disease superinduced by neglect of authorities of the city to observe sanitary laws in a construction or maintenance of a system of sewerage, cannot recover damages from the municipality.

Police officers appointed by cities are not its agents or servants, in such a sense as to render a city responsible for the damages occasioned to third persons by failure on their part to duly and properly discharge the duties imposed upon them. *McKay v. City of Buffalo*, 9 Hun, 401, affirmed in 74 N. Y. 619. In *Woodhull v. Mayor*, 150 N. Y. 450, it was held that the cities of New York and Brooklyn were not liable for the acts of a bridge policeman done in his public character as a policeman. *Kunz v. City of Troy*, 36 Hun, 615, follows *McKay v. City of Buffalo*, 9 Hun, 401.

Nor is a municipal corporation liable for the negligence of firemen, while engaged in the discharge of their duties. The members of a fire department do not act as the servants or agents of city, but as officers charged with public service for whose act therein no action of negligence lies against the city. *Smith v. City of Rochester*, 76 N. Y. 506.

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Nor is a municipal corporation liable for neglect or misconduct of its health officers. It cannot be held responsible for the consequences of wrongful acts of the board of health, its agents, or employees. *Parker & Worthington on Public Health and Safety*, § 160, and cases cited; *Bamber v. City of Rochester*, 26 Hun, 587, affirmed on opinion below, 97 N. Y. 625, which cites 2 Dill. on Mun. Corp. 772; *Ham v. Mayor of New York*, 70 N. Y. 459; *Tone v. Mayor*, 70 N. Y. 157, distinguishing *Tormey v. Mayor*, 12 Hun, 542.

Nor is a city responsible for the acts or omissions of the department of buildings. *Connors v. Mayor*, 11 Hun, 439, citing *Mazmilian v. Mayor*, 62 N. Y. 160.

In *Ham v. Mayor of New York*, 70 N. Y. 459, it is held that the department of public instruction of the city of New York is charged with the performance of duties, not local or corporate, but relating and belonging to an administrative branch of the State government; that the commissioners in this department have exclusive authority as to the employ and control of subordinates and servants, and that the city corporation, therefore, is not liable for negligence or unskillfulness on the part of subordinates or servants employed by the commissioners.

It is held in *Mahon v. Mayor of New York* (Common Pleas, Gen. Term), 1 Ann. Cas. 361, that the park commissioners of the city of New York are the agents of the city in the management of its corporate property committed to their charge, and that the city is responsible for their acts if within the scope of their authority, followed by note on "Municipal liability for tortious acts of officers and agents," p. 366.

§ 8. Liability for acts of assessors and collectors of taxes.—Municipal corporations are not responsible for the tortious act of the city treasurer, or of assessors, or collectors of taxes, while acting in the line of their duty. It is held that the assessors and collectors are not in any legal sense the agents of the town in its corporate capacity in the assessment and collection of taxes, and the town is not responsible for any mistake or misfeasance by them in the performance of its duties. *Lorillard v. Town of Monroe*, 11 N. Y. 392. This case, with others, is cited in *Consolidated Ice Co. v. Mayor of New York*, 166 N. Y. 92 (102), to the proposition that assessors are not agents of a town or city, nor is either responsible for their acts, whether a result of mistake or

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misfeasance, but they are independent public officers whose duties in no respect concern the strictly corporate interests of the municipality. Same rule having been distinctly stated in *People ex rel. Eckerson v. Zundel*, 157 N. Y. 513, opinion Martin, J., 518, and in *People ex rel. New England Dressed Meat Co. v. Roberts*, 155 N. Y. 408, opinion Martin, J., 413, citing Mechem on Public Officers, § 28.

Actions to recover money paid for illegal taxes may be maintained under some circumstances, but there must exist these facts: First. The authority to levy the tax must have been wholly wanting; making the tax invalid and not merely irregular. So held as to the local assessors in *Peyser v. Mayor*, 70 N. Y. 497, where it is also held that there must have been duress under which the person was obliged to pay the tax, which is the second requisite in order to recover. Third. The money must have been received by the municipality for its own use in carrying out corporate purposes distinct from public purposes. *Howell v. City of Buffalo*, 15 N. Y. 512; *Dewey v. Supervisors of Niagara County*, 62 N. Y. 294 — the latter case holding that a county can only be made liable for money alleged to have been wrongfully demanded or collected, or had and received by it for the benefit of another, where the moneys have come to its treasury for its use, or where it has had, or might have had the benefit thereof.

Where a warrant was issued to a constable, directing him to collect from the persons named in a schedule annexed and upon the assessment and tax-roll of a certain ward, the several sums opposite to their names, and the constable seized property belonging to the plaintiff, whose name did not appear upon either list, the court held, in an action for conversion, that the corporation was not liable. The decision here was placed on the ground that the tortious taking by the constable was neither authorized by it in the beginning nor subsequently ratified. Being a wholly unauthorized act, the corporation could not be made responsible for it. *Everson v. Syracuse*, 100 N. Y. 577; Williams on Municipal Liability for Tort, 46.

But where a municipal corporation acting through its officers in the execution of the power conferred upon it to collect a tax assessed upon a particular citizen, enforces its collection out of the property of another in no wise liable therefor, and appropriates the proceeds of the collection to its own use, with full knowledge

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of the illegality of the proceeding, it becomes liable to the owner for the spoliation of his property. *Teall v. City of Syracuse*, 120 N. Y. 184, distinguishing *Everson v. City of Syracuse*, 100 N. Y. 577.

If the property taxed is exempt from taxation by Federal statute, as in the case of United States bonds, an illegal tax thereon can be recovered back from the city. *National Bank of Chemung v. Chemung County*, 53 N. Y. 49.

In *Ætna Ins. Co. v. Mayor*, 153 N. Y. 331, it was held that an action may be maintained to recover back moneys voluntarily paid in satisfaction of a tax without first having the assessment set aside or vacated, or making a prior demand for the return of the money, if the assessment, although valid on its face, is in fact void, because the assessors had no jurisdiction to make it.

A local assessment, originally invalid, collected with no color of authority for corporate purposes, may be recovered with interest. *Bank of the Commonwealth v. Mayor*, 43 N. Y. 184 (189).

The decision in this case is apparently placed upon two grounds: First. That there was no valid statute of the State authorizing the assessment and collection of a tax upon United States bonds; that all the statutes purporting to give such authority were void under the Constitution of the United States. Second. That the action was not based upon the misfeasance of the agents of the city in collecting the money, but to recover moneys in the hands of the defendant city which did not belong to it, but to the plaintiff, for the reason that the money was received by defendant through machinery created by law to collect money for it, which was invalid, and that no title could thereby be acquired to the money. Distinguishing *Lorillard v. Town of Monroe*, 11 N. Y. 392.

In *Bowen v. May*, 120 N. Y. 357 (365), it is held that when a collector of taxes holds a tax warrant, valid on its face, by which he threatens to sell the lands against which the tax is assessed if it is not paid, the payment of the tax by the landowner is not a voluntary one. Citing *Bruecher v. Village of Port Chester*, 101 N. Y. 240.

In such case an action may be maintained to recover back the amount involuntarily paid without first having the assessment set aside or vacated, and demand for the return of the money is

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unnecessary before the commencement of an action to recover it. *Ætna Ins. Co. v. Mayor*, 153 N. Y. 331 (339).

A mere protest against payment of the money upon a tax is not sufficient to authorize its recovery. *Union Pacific R. R. Co. v. Dodge County Comrs.*, 98 U. S. 541; *Silliman v. Wing*, 7 Hill, 159; *Phelps v. New York*, 112 N. Y. 216, opinion Gray, J.

Judge Dillon (§ 943) says that "The coercion or duress which will render a payment of taxes involuntary must in general consist of some actual or threatened exercise of power, possessed, or believed to be possessed, by the party receiving the payment from the person or property of another, from which the latter has no other means of immediate relief except by making payment.

§ 9. **Liability for use of municipal property.**— Upon the ground that owners of property are liable for its improper use and condition, municipal corporations have been held liable for damages caused by defective condition of property, which is held by them in the private character of owner or lessee, to the same extent, and in the same manner, as private corporations and individuals. *Tiedman*, § 336a, citing *Hill v. Boston*, 122 Mass. 344 (359).

The following New York cases are cited by *Tiedman* as bearing upon this proposition: *Bailey v. New York*, 3 Hill, 531 (539); *Radway v. Briggs*, 37 N. Y. 256; *Kennedy v. Mayor*, 73 N. Y. 365. See *Seaman v. Mayor*, 80 N. Y. 239.

*Radway v. Briggs*, 37 N. Y. 256, holds that the right to collect wharfage by a State corporation carries with it the correlative duty of keeping wharves in repair; and that where the defendant had transferred that right to another party the lessee was liable in damages.

In *McAvoy v. Mayor*, 54 How. Pr. 247, Judge Barrett holds that the city of New York is responsible for damages caused by negligence of the Croton aqueduct department, or department of public works, in laying and keeping in repair the water pipes in the streets of said city upon the ground that it is a corporate and not a political or governmental duty. Distinguishing it from *Maximilian v. Mayor*, 62 N. Y. 160.

A municipal corporation in its private capacity of owner of lands and houses is to be regarded in the same light as an individual and dealt with accordingly; so held with regard to dam on Croton sewer forming part of water works. *Bailey v. The Mayor*, 3 Hill, 531.

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Where a city owns property used other than for governmental purposes, or receives benefit from such property, it is liable as an individual. It seems that a city is charged with the duty of keeping a dock owned by it in a safe condition, and if in using it in a customary way party is injured without fault of his, city is liable. *Kennedy v. Mayor*, 73 N. Y. 365.

§ 10. **Liability for consequential injury to property.**— When, in the exercise of authority conferred upon them by the legislature, municipal corporations perform acts, as a result of which some indirect or consequential injury is sustained by an individual, the latter has no right of action for such injury. Such injuries are *damnum absque injuria*. But when a corporation takes the property of an individual it must pay for it. *Hoffmeyer v. City of Brooklyn*, 162 N. Y. 584, citing *Radcliff's Exrs. v. Mayor*, 4 N. Y. 205; *Bellinger v. N. Y. C. R. R. Co.*, 23 N. Y. 47; *Atwater v. Trustees of the Village of Canandaigua*, 124 N. Y. 602; *Noonan v. City of Albany*, 79 N. Y. 476; *N. Y. C. & H. R. R. Co. v. City of Rochester*, 127 N. Y. 591, and *Seifert v. City of Brooklyn*, 101 N. Y. 143, distinguishing *St. Peter v. Demson*, 58 N. Y. 416.

These authorities with the *Hoffmeyer case*, *supra*, are again cited in *Fries v. N. Y. & Harlem R. R. Co.*, 169 N. Y. 270, distinguishing *Lewis v. N. Y. & H. R. R. Co.*, 162 N. Y. 202, holding, opinion Martin, J., that it is well settled that acts authorized by an express enactment of the legislature, and performed in good faith upon work of a public character, do not render the person performing them liable for special damages, unless there is an absence of due care or skill in the execution of the work; that an act done under the express authority of law for a public purpose, if done in the proper manner, and the property of an individual is not taken or encroached upon, will not subject the person doing it for its consequences, whatever they may be, unless the law provides compensation for injuries of that character. See *Muhlker v. N. Y. & H. R. R. Co.*, 173 N. Y. 549.

In *Radcliff's Exrs. v. Mayor*, 4 N. Y. 195, it is held that where a municipal corporation, under authority of its charter, grades and levels a street, an action will not lie by an adjoining owner whose lands are not actually taken, for special damages to his premises, where there is no want of care or skill in the exe-

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cution of the work, and no provision in the charter for the payment of damages of that kind.

A municipal corporation acting under its powers conferred by the legislature to make, repair, grade, and improve streets, may grade or alter the grade of streets already established, without liability for damages, where there is no actual entry on private property, and the work is confined to a street, provided reasonable care is employed in doing the work, in the absence of a statute giving compensation in such cases. *Urquhart v. City of Ogdenburgh*, 91 N. Y. 67; *Watson v. City of Kingston*, 114 N. Y. 88.

§ 11. **Liability for property destroyed by mob.**—By the provisions of the General Municipal Law (chap. 17, General Laws, § 21), a city or county is made liable to a person whose property is destroyed or injured by a mob or riot. Chapter 428, Laws of 1855, is repealed by that chapter.

At common law municipal corporations were not subjected to any responsibility for the safety of private property within their limits. Williams on Municipal Liability for Torts, 290; Tiedman, § 334; *Louisiana, etc. v. New Orleans*, 109 U. S. 285.

The principle of legislation upon this subject is said to be derived from England, and that as early as 1285, Parliament, by statute, provided a remedy against the hundred, county, etc., in which a robbery should take place for the damages caused thereby. The legislation upon this subject eventuated in the Riot Act of George I, one of the sections of which provided that in case a church or dwelling-house should be destroyed by mob, the inhabitants of the hundred, in which it should be situated, should be liable for its value. The thing to be accomplished is not merely compensation for loss, but prevention of loss with compulsory compensation as the incentive. *Underhill v. Manchester*, 45 N. H. 225.

In *Darlington v. The Mayor*, 31 N. Y. 164, it was held that an act for compensating parties whose property may be destroyed in consequence of mobs and riots (Laws of 1855, chap. 428), was constitutional. *Orr v. City of Brooklyn*, 36 N. Y. 661.

Since an action of this character is brought under special statute and maintainable solely by its authority, the limitation as to time within which the suit must be brought is so incorporated with the remedy as to make it an integral part of it, a condition

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precedent to the maintenance of the action. *Hill v. Supervisors of Rensselaer County*, 119 N. Y. 340.

§ 12. **Not liable for damages from works of construction.**—A municipal corporation does not insure the citizen against damage from works of its construction. Its obligation and duty in such respect is measured by the exercise of reasonable care and diligence. Liability can only be predicated upon its neglect and misconduct. *Jenney v. City of Brooklyn*, 120 N. Y. 164.

In an action to recover damages for injuries to the vault of a building, constructed under a sidewalk, alleged to have been caused by the negligence of defendant in blasting while engaged in excavating a trench in the street in front of the building, under a municipal contract providing that the blasting should be conducted in conformity with the city ordinances, where there is no evidence showing or tending to show negligence in the performance of the work, and for aught that appears the injuries may have been a natural result thereof, influenced possibly in addition by some weakness in the construction of the building, a nonsuit is properly granted. *Holland House Co. v. Baird*, 169 N. Y. 136.

In *Bates v. Holbrook*, 171 N. Y. 460, the court discusses the liability of contractors for damages in carrying on a work in the streets of the city authorized by statute. At page 468 it is said that the law is settled in this State that acts which are authorized by the express enactments of the legislature, and performed in good faith upon work of a public character, do not render the persons performing them liable for consequential damages, unless there is an absence of due care and skill in the execution of the work. It is held that the plaintiff in the case then at bar must suffer the annoyance and injury from such acts as were reasonably necessary to the execution of the work; but that the maintaining of permanent structures for the purpose of carrying on the work at other points placed an unjust and undue burden upon him. That while damages which are inflicted upon abutting property-owners in the performance of public work are reasonably and properly regarded as *damnum absque injuria*, the exemption rests upon the necessity of the situation, and the fact that the defendants were engaged in public work was, under the circumstances, no defense to the charge that the structures in front of plaintiff's



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property were a nuisance. O'Brien, J., filed a vigorous dissenting opinion in this case, in which Parker, Ch. J., concurred.

**ARTICLE XIII.****CHARITABLE CORPORATIONS.**

The question of liability of charitable corporations for negligence is considered in *Glavin v. Rhode Island Hospital*, 12 R. I. 411 (1879), and *Hearns v. Waterbury Hospital*, 66 Conn. 98 (1895), cases reprinted; Erwin's Cases on Torts, 107, 129.

The Connecticut case cites, among others, *Harris v. Woman's Hospital*, 27 Abb. N. C. 37, 14 N. Y. Supp. 881, stating, however, that the case was decided on questions of fact, and that no actual negligence or want of care was found on the part of the hospital authorities, the surgeons, or the nurse.

In that case, a former decision holding that a charity patient has the same right of action for malpractice as one who pays for attendance is approved; and *Becker v. Janinski*, 27 Abb. N. C. 45, 15 N. Y. Supp. 675, is followed by a note as to the responsibility of physicians and surgeons for skill and care in charitable or gratuitous service.

A charitable corporation organized for the purpose of giving gratuitous surgical treatment to indigent persons is not liable for injuries resulting from performing an operation on the patient, where the corporation has exercised due care in the selection of its skilled employees and surgeons. *Van Tassel v. Manhattan Eye and Ear Hospital*, 15 N. Y. Supp. 620. Note to this case cites a number of authorities, and the case itself is cited to the main proposition in *Joel v. Woman's Hospital*, 89 Hun, 73, 35 N. Y. Supp. 37.

In *Ward v. St. Vincent's Hospital*, 39 App. Div. 624, 57 N. Y. Supp. 784, it was held that a contract made by a corporation maintaining a charity hospital, to receive a patient into its hospital and for an agreed compensation furnish her with a skillful, trained, and competent nurse, was within the powers of the hospital and that it was liable for negligence, granting a new trial to plaintiff. 65 App. Div. 64, 72 N. Y. Supp. 587, reports the case on appeal from the verdict of a jury in favor of plaintiff. The same rule seems to have been adhered to, and the case sent back for a new trial upon exception to request to charge. 78 App.

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Div. 317, 79 N. Y. Supp. 1004, the case is reported upon third trial, the jury having again found in favor of plaintiff. At page 320 of the opinion it is said that as an original proposition there is very much doubt whether the corporation had power to make a contract of that character, but holds that the law was settled by the decision in 39 App. Div. 624, *supra*, and is now the law of the case, citing *Downes v. Harper Hospital*, 101 Mich. 555; *Gooch v. Association for Relief of Aged Females*, 109 Mass. 558; *Benton v. Trustees of Boston City Hospital*, 140 Mass. 13; *Perry v. House of Refuge*, 63 Md. 20; *Powers v. Massachusetts Homeopathic Hospital*, 101 Fed. 896.

In *Collins v. New York Post-Graduate Medical School*, 59 App. Div. 63, at page 66, 69 N. Y. Supp. 106, of the opinion it is said that however opinions may differ on the question of the policy of exempting charitable institutions from the ordinary rule of *respondeat superior*, the law is too well settled in this State to permit a recovery against the institutions for the wrong committed by the surgeon who operates upon a plaintiff gratuitously, citing authorities in this and other jurisdictions.

*Corbett v. St. Vincent's Industrial School*, 79 App. Div. 334, 79 N. Y. Supp. 369, collates the authorities with reference to liability of institutions of this character and arrives at the conclusion that since the State is not liable for the injury sustained by an inmate of any of its prisons, reformatories, or other institutions, which is the result of negligence, an institution, such as is the defendant in that case, should not be held liable for injuries sustained through negligence by persons committed to its custody.

**ARTICLE XIV.**

**ACTION BY PERSONAL REPRESENTATIVE TO RECOVER FOR DEATH BY WRONGFUL ACT.**

Independent of statutory provisions no action lies for injury which results in death. Buswell on Law of Personal Injuries, § 15, citing *Parker v. Bolton*, 1 Campb. 493, in which Lord Ellenborough laid down the proposition that "In a civil court the death of a human being could not be complained of as an injury."

Tiffany on Death by Wrongful Act, §§ 2-15, collates the authorities on this subject.

It is said in *Insurance Co. v. Brame*, 95 U. S. 754, that the

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authorities are so numerous and so uniform to the proposition that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question. Mr. Justice Hunt adds, that it has been so decided in many cases in the English courts, and in many of the State courts, and no deliberate, well-considered decision to the contrary is to be found. Such a recovery was had before the statute in *Ford v. Monroe*, 20 Wend. 211, but the point that the action would not lie does not seem to have been made. It was not in any event passed upon or noticed by the court, and it is said by Chief Justice Waite, in "*The Harrisburg*," 119 U. S. 202, that if ever an authority for such an action, it was substantially overruled in *Greene v. Hudson River R. R. Co.*, 2 Keyes, 294, 2 Abb. Dec. 277, which holds explicitly that, in the absence of statutory provision therefor, such an action will not lie, citing *Whitford v. Panama R. R. Co.*, 23 N. Y. 476, where it is said that *Ford v. Monroe* was disapproved of in *Pack v. The Mayor*, 3 N. Y. 493.

Actions for damages by reason of injuries resulting in death were unknown to the common law and are founded wholly upon the statute. *Stuber v. McEntee*, 142 N. Y. 200.

A cause of action to recover damages for a death caused by defendant's negligence is for a tort; it exists only by virtue of the statute and is based entirely upon negligence and tortious conduct of the defendants. *Robinson v. Oceanic Steam Navigation Co.*, 112 N. Y. 315.

The right of action against a person causing the death of another was first given in England, by what is known as Lord Campbell's Act, entitled "An act for compensating the families of persons killed by accident," passed in 1846, which seems to have already been the law of Scotland. Holland's Jurisprudence, 153. Lord Campbell's Act was followed in this State by chapter 450, Laws of 1847, giving the first statutory remedy in this State which was amended in 1849, chapter 256, by limiting the recovery to \$5,000; in 1870, chapter 78, by providing for addition of interest to the recovery. By amendment to the Constitution, 1894, article I, section 18, the amount of damages recoverable in such action cannot be restricted by law. The statutory provision became part of the Code of Procedure in the Throop Revision, § 1902, etc., by which the right of action is given for wrongful act, neglect, or default, by which death of decedent, leaving husband, wife, or next of kin, has been caused, against the

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person or corporation which would have been liable for injury if death had not ensued. Provisions are made for the distribution of any fund which may arise in the action. It is held that this action did not transfer a right of action from the decedent to the representative of the deceased party, but gives a wholly new right of action. *Black v. Midland R. R. Co.*, 8 Q. B. 931; *Littlewood v. Mayor*, 89 N. Y. 24.

Distinguishing features of the action are that it may be maintained whenever death is caused by negligence such as would, if death had not ensued, have entitled the party injured to maintain an action; that it is for the exclusive benefit of persons mentioned in the statute, and members of the family of the deceased, and that the damages recoverable are such as result to the beneficiary from the death. *Tiffany on Death by Wrongful Act*, § 22.

The right of action given by section 1902 is to recover for damages for wrongs done to the property rights or interest of the beneficiaries thereof and not for injuries to the person of the decedent, and, therefore, is a property right which is not affected by the beneficiary's death but becomes a part of his estate. *Matter of Meekin*, 164 N. Y. 145.

The rule that plaintiff cannot recover if the party injured in any degree contributes to the injury does not apply to an action for injury caused by assault made by the defendant resulting in death. An act of plaintiff, however slight, which excites the defendant to commit an assault, however violent, will not prevent a recovery for such assault by the plaintiff's representative. *Kain v. Larkin*, 56 Hun, 79, 9 N. Y. Supp. 89.

The rules relating to this cause of action belong rather to a consideration of the law of negligence, which is the basis of the action, than to a discussion as to the rights of parties, beyond the general principles here stated.

ARTICLE XV.

EFFECT OF DEATH OF PARTY PLAINTIFF OR DEFENDANT.

The common-law rule was *actio moritur cum persona*, the right of action for tort is put an end to by the death of either party, even if an action has been commenced in his lifetime. *Pollock*, 71, citing case from *Year-Book*.

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Bigelow on Torts, § 107, says with reference to the rule that actions for tort did not survive the death of plaintiff or defendant at common law, that both the origin and justification of this rule are matters of doubt, but no common-law rule has been more steadily maintained, except as statute law affected it. Citing *dictum* by Newton, Ch. J., from Year-Book, that "if one doth a trespass to me and dieth, the action is dead also, because it should be inconvenient to recover against one who was not party to the wrong."

By the common law, causes of action classed as *ex delicto* did not survive the death of the person injured, nor that of the wrongdoer; neither were they assignable. One of the reasons upon which this rule, that they were not assignable, was based, was, that the title to a cause of action could not vest in a person who could not prosecute the same after the death of the party who suffered the injury. The injustice of the rule was manifest as to a class of actions founded in tort, as was long ago recognized in England, and its rigidity relaxed in a large number of cases by parliamentary enactments, authorizing suits to be maintained by executors and administrators for causes of action existing in the lifetime of the deceased. \* \* \* The Revised Statutes have proceeded upon the assumption that this rule of the common law was in force in this State, and, without legislative sanction, actions for a tort could not be maintained against the tortfeasor by the personal representatives of the deceased party. *Moore v. McKinstrey*, 37 Hun, 194 (187), citing *Cregin v. Brooklyn Cross-town R. R. Co.*, 75 N. Y. 192; *Murphy v. N. Y. C. & H. R. R. R. Co.*, 31 Hun, 358; *Kelsey v. Jewett*, 34 Hun, 11.

Legislation modifying the common-law rule began as early as 1330, by which a cause of action was given for goods and chattels of the testator carried away in their lifetime. Bigelow, § 107.

The Revised Statutes provide (9th ed., pp. 1907 and 1908) as follows:

"Section 1. For wrongs done to the property, rights, or interests of another, for which an action might be maintained against the wrongdoer, such action may be brought by the person injured, or after his death, by his executors or administrators, against such wrongdoer, and after his death against his executors or administrators, in the same manner and with the like effect in all respects as actions founded upon contracts.

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“§ 2. But the preceding section shall not extend to actions for slander, for libel, or to actions of assault and battery, or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator.”

The rights and interests for tortious injuries to which this statute preserves the right of action have frequently been considered, and it is generally held that they must be pecuniary rights or interests, by injuries to which the estate of the deceased is diminished. The exceptions in the statute are such as scarcely to leave any conceivable action for injuries to other rights uncovered by them. But where an injury to pecuniary interests is shown, the intent of the statute seems plain that the cause of action shall survive, notwithstanding that such injury be caused by a tort, provided it be not one of the torts specifically mentioned and excepted in section 2. All pecuniary rights (not resulting from the enumerated and excepted causes, such as assault and battery, slander, etc.) are placed upon the same footing when occasioned by a tort, as if arising from breach of contract, and such is the language of the statute. It declares that for wrongs done to the rights or interests of another (except the specified wrongs), the cause of action shall survive in the same manner and with the like effect in all respects as actions founded upon contracts. In *Haight v. Hayt*, 19 N. Y. 464, 468, it is said by Grover, J., that the exceptions contained in the section manifest the intention of the legislature that all other actions founded upon torts should survive. And in the same case at page 474, Denio, J., says that “the cause of action (which was for false representations), was for a wrong done to the rights and interests of the plaintiffs. The exception in section 2 shows, if there was otherwise any doubt, that the prior section was intended to embrace this case.” *Cregin v. Brooklyn Crosstown R. R. Co.*, 75 N. Y. 192 (194, 195), cited *Bennett v. Bennett*, 116 N. Y. 584 (588). See s. c., 83 N. Y. 595.

Where the plaintiff, in an action to recover damages for personal injuries caused by the defendant's negligence, dies pending an appeal from a judgment dismissing the complaint, the action abates, and it cannot be revived by his personal representatives, even for the purpose of relieving the estate from its liability to pay costs — certainly where it does not appear that any judgment

## Art. 15. Effect of Death of Party Plaintiff or Defendant.

for costs was entered. A nonsuit is not a "verdict, report, or decision," within the meaning of section 764 of the Code of Civil Procedure. *Lutz v. Third Ave. R. R. Co.*, 44 App. Div. 256, 60 N. Y. Supp. 761. See *Corbett v. Twenty-third St. R. R. Co.*, 114 N. Y. 579; *Peetsch v. Quinn*, 6 Misc. Rep. 50, 26 N. Y. Supp. 728; *Vitto v. Farley*, 6 App. Div. 481, 39 N. Y. Supp. 683.

The defendant in a cause of action which abates may waive the defense and the stipulation will be enforced. *Cox v. N. Y. C. & H. R. R. Co.*, 11 Hun, 621; *Roberts v. Marsen*, 23 Hun, 486.

After a verdict, an action for personal injury does not abate (*Wood v. Phillips*, 11 Abb. Pr. (N. S.) 1), unless the verdict is set aside. *Kelsey v. Jewett*, 34 Hun, 11; *Stringham v. Stuart*, 22 Abb. N. C. 281.

Where the plaintiff died on the first day of the circuit and subsequently his attorney recovered a verdict in the same suit, it was held that as the whole time of the circuit related to the first day the plaintiff's death was regarded as a death after verdict. *Morris v. Corson*, 7 Cow. 281; *Broas v. Mersereau*, 18 Wend. 653.

Where the verdict for the plaintiff is set aside after the defendant's death, the plaintiff may appeal from the order denying a motion to revive the action. This is regarded not as prosecuting an action for the original tort, but as an endeavor to save and restore the verdict. *Vitto v. Farley*, 6 App. Div. 481, 39 N. Y. Supp. 683.

An action for obstructing or diverting a water-course survives. *Miller v. Young*, 90 Hun, 132, 70 St. Rep. 507, 35 N. Y. Supp. 643.

An action for damages for carrying away plaintiff's goods, as distinguished from replevin, survives. *Heinmuller v. Gray*, 13 Abb. Pr. (N. S.) 299, 3 J. & S. 196.

It seems that replevin does not abate by the death of the defendant. *Roberts v. Marson*, 23 Hun, 486; *Potter v. Van Vranken*, 36 N. Y. 619. This is expressly provided by section 1736 of Code.

A cause of action for loss of services of plaintiff's child through defendant's negligence survives defendant's death. *Stephen v. Woodruff*, 18 App. Div. 625, 45 N. Y. Supp. 712.

A cause of action under a penal statute, such as an action under

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the old Civil Damage Act, survives the death of the plaintiff (*Kilburn v. Coe*, 48 How. Pr. 144); also the death of the defendant. *Moriarity v. Bartlett*, 34 Hun, 272; *Morenus v. Crawford*, 51 Hun, 89.

Where there has been an action for trespass against two defendants and one dies, the plaintiff may continue action against the survivor. *Gardner v. Walker*, 22 How. Pr. 405.

An action by the father of an intestate, killed by negligence, does not abate upon the death of the father, for he is the person to whom the recovery exclusively belongs under the statute. The action may properly survive in the name of the administrator *de bonis non* of the injured party. *Mundt v. Glokner*, 24 App. Div. 110, 48 N. Y. Supp. 940; appeal dismissed in 160 N. Y. 571; *Matter of Meekin*, 164 N. Y. 145. The recovery is restricted under these cases to the pecuniary loss by the father.

The action against director of a bank for losses incurred by negligent conduct of the bank's directors survives against his personal representatives. *O'Brien v. Blaut*, 17 App. Div. 288, 45 N. Y. Supp. 217.

In *Potter v. Van Vranken*, 36 N. Y. 619, it is said, that goods taken and continuing in specie in the hands of a wrongdoer may be recovered back by the executor or personal representative of the owner, and if they have been disposed of, an action for money had and received will lie to recover their value. That in no case, after action brought, will it abate by the death of plaintiff, if the cause of action be such that it might have been prosecuted by the executor or administrator of the party.

In *Hegerick v. Keddle*, 99 N. Y. 258, Ruger, Ch. J., discusses the history of the statutory modifications in this State of the rule of the common law as to the survivability of actions and collates the authorities upon the subject.

The provisions of the Revised Statutes modifying the common-law rule in regard to the survivability of actions *ex delicto* affect only injuries to property rights; and as to causes of action which do not affect or concern any property right or interest as the subject of the inquiry, the common-law rule applies, and the action abates upon the death of either party. *Brackett v. Griswold*, 103 N. Y. 425, citing *Stokes v. Stickney*, 96 N. Y. 323; *Hegerick v. Keddle*, 99 N. Y. 258.

The subject is again considered in *Blake v. Griswold*, 104 N. Y.



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613, where it is held that "the rule of the common law governs the question as to the survivability of a cause of action, to recover the penalty imposed by said act upon a trustee of a corporation organized under it, who has joined in making a false annual report; it is not affected by any provision of the Code, and the action abates upon the death of either party.

Where, however, the plaintiff in such an action dies after the rendition of judgment, the action does not abate; the cause of action is merged in the judgment, which passes as assets to the representatives of the deceased, and they are entitled to be substituted in his place."

An action against a contractor of a corporation organized under the General Manufacturing Act, to recover a debt due from the company because of failure of defendant to make and file an annual report as required by the act, is an action *ex delicto*, and abates upon the death of either party before verdict. *Carr v. Risher*, 119 N. Y. 117, citing *Stokes v. Stickney*, 96 N. Y. 323; *Brackett v. Griswold*, 103 N. Y. 425; *Blake v. Griswold*, 104 N. Y. 613.

All actions founded upon tort survive except those named in section 2 of 2 R. S. 448, § 1. For example, an action for deceit. *Haight v. Hayt*, 19 N. Y. 464; *Byxhie v. Wood*, 24 N. Y. 607; *Hadcock v. Osmer*, 4 App. Div. 435, 38 N. Y. Supp. 618.

In a wrong against property the action survives whether the wrongdoer derived any benefit from the act or not. It seems that it also survives against the representative of the wrongdoer, though the contrary has been held. *Dinny v. Fay*, 38 Barb. 18.

An action for breach of promise cannot survive against the representatives of defendant. *Wade v. Kalbfleisch*, 58 N. Y. 282; *Price v. Price*, 75 N. Y. 244.

An action for conversion abates. *Emerson v. Bleakley*, 2 Abb. Ct. App. Dec. 22.

But an action for fraudulent overdrafts survives. *Union Bank v. Mott*, 27 N. Y. 633.

An action by a taxpayer under the provisions of the Code and statute survives the death of plaintiff, and may continue in the names of his executors or administrators on their motion or that of a defendant. *Gorden v. Strong*, 158 N. Y. 407.

Where an action is based partly upon injuries to the person

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and partly upon injuries to property, that part abates which relates to the personal injury upon the death of defendant, but that part relating to injury to property survives. Thus, where a plumber was sued for improperly making repairs owing to which the health of the plaintiff and family suffered, causing expenses for care and medical attendance, the part relating to the personal injury abates, but the action survives in respect to the damages caused by the children's sickness. *Scott v. Brown*, 24 Hun, 620.

The rule is illustrated in the case of *Hatchard v. Mege*, 18 Q. B. Div. 771. The action was for falsely and maliciously publishing a statement calculated to injure the plaintiff's right of property in a trademark. Plaintiff died. It was held that the action abated only so far as it was a claim for libel, but so far as the tort was in the nature of slander of title the action survived.

Sections 755 to 766 of the Code, inclusive, relate to proceedings upon the death and disability of a party, or transfer of his interest, and provide, among other things, that an action does not abate by any event, if the cause of action survives or continues, making also provision for preventing the abatement of a special proceeding. These provisions of the Code relate mainly to the method of procedure in case of death or transfer of interest, including, however, provisions to the effect that if either party to an action, which would otherwise abate, dies after verdict, etc., but before final judgment, such judgment may be entered; and that after a verdict, report, or decision an action does not abate by the death of a party.

Section 764 is limited to actions for personal injuries, and if the verdict is set aside and the plaintiff dies before a new trial the action abates. *Kelsey v. Jewett*, 34 Hun, 11. See also as to these actions, *Corbett v. Twenty-third St. Ry. Co.*, 114 N. Y. 579; *Comstock v. Dodge*, 43 How. 97.

The authorities as to what actions survive and what abate by death are collated in Fiero on Special Actions, p. 1203 *et seq.* and are also cited under each topic relative to particular torts.

**ARTICLE XVI.****ASSIGNMENT OF CAUSE OF ACTION FOR TORT.**

Actions for tort, not harmful to property, are not assignable at common law. It was a principle of the common law that a right of action could not be transferred by him who had the right, to another. This rule was never followed in courts of equity. *Thallhimer v. Brinckerhoff*, 3 Cpw. 623.

Bigelow (7th ed., p. 51), says: "Actions for tort not harmful to property are not assignable. Various reasons have been given, the common one being that such actions are peculiarly personal. How, it is asked, can another represent one whose good name has been tarnished, or whose happiness has been ruined? Perhaps the explanation really runs back to the time when torts had not yet detached themselves from crimes. Crimes of course were always personal; torts continued, after the separation, to be regarded as of the same nature, except where damages were done to property. It may also be noticed that things which are not descendible, as torts are not, are not ordinarily alienable. Torts, however, which harm property, as they survive, are assignable. So too are judgments in damages for torts."

The Code provides for the transfer and assignment of certain demands as follows:

"§ 1910. What claims or demands may be transferred.—Any claim or demand can be transferred, except in one of the following cases:

"1. Where it is to recover damages for a personal injury, or for a breach of promise to marry.

"2. Where it is founded upon a grant, which is made void by a statute of the State; or upon a claim to or interest in real property, a grant of which, by the transferror, would be void by such a statute.

"3. Where a transfer thereof is expressly forbidden by a statute of the State, or of the United States, or would contravene public policy."

Some of the leading cases with reference to the assignability of causes of action arising out of tort are given, but no attempt will be made at full discussion of the subject under this article, since the right to assign a cause of action is considered under different forms of action. The term "personal injury," as referred

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to in section 1910, is defined by section 3343, subdivision 9, as including libel, slander, criminal conversation, seduction, malicious prosecution, assault and battery, false imprisonment or other actionable injury to the person either of the plaintiff or another.

While at common law, and as a general rule, the qualities of assignability and survival are tests each of the other and convertible terms, as was held in *Hegerich v. Keddie*, 99 N. Y. 258; *Brackett v. Griswold*, 103 N. Y. 425, yet the legislature may furnish a new statutory rule of assignability, leaving the law as to survival of causes of action unchanged. *Blake v. Griswold*, 104 N. Y. 613 (616, 617). Query, as to whether such change has been made by sections 1909-1910.

In *Zabriskie v. Smith*, 13 N. Y. 322, the right to transfer a cause of action for a tort is considered. It is said in opinion of Denio, J., 332, that in *McKee v. Judd*, 12 N. Y. 622, it was held that the right of action for the conversion of personal chattels might be assigned so as to vest property in the assignee, and the opinion then proceeds to discuss the right to assign a cause of action for damages caused by a false and fraudulent representation of the solvency of the vendee, and holds that it is not assignable. In the course of the discussion the maxim of the common law that a personal action dies with the person is considered and commented upon, together with the fact that actions *ex delicto* were not assignable until the statutes of Edward III, changing the rule in that respect.

In *Pulver v. Harris*, 52 N. Y. 73, it is held that a claim for assault and battery is not assignable.

In *Merrill v. Grinnel*, 30 N. Y. 594, that a cause of action for the loss of a passenger's trunk may be assigned; and in *Quinn v. Moore*, 15 N. Y. 432, that a mother's interest in a suit for causing child's death may be transferred.

*Byxbie v. Wood*, 24 N. Y. 607, is authority for the rule that a cause of action for money obtained by false representations may be assigned.

In *Meech v. Stoner*, 19 N. Y. 26, the same rule as to an action to recover money lost at gambling.

An assignment of action, with all claims or demands, or any portion of them, carries a right of action for their previous conversion, to the assignee. *Sherman v. Elder*, 24 N. Y. 381; *Buckley v. Wells*, 33 N. Y. 518.

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 Art. 17. Receiver, when Liable for Tort.
 

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Actions for fraud and false representations are assignable. *Johnson v. Bennett*, 5 Abb. Pr. (N. S.) 331; *Graves v. Spier*, 58 Barb. 349; *French v. White*, 5 Duer, 254.

An action for conversion is assignable. *Wolf v. Rausch*, 22 Misc. Rep. 101, 48 N. Y. Supp. 716; *Richtmyer v. Remsen*, 38 N. Y. 206; *Haight v. Hayt*, 19 N. Y. 464.

A claim for damages caused by a leaking tank is assignable. *Butts v. J. C. Mackay Co.*, 55 St. Rep. 137.

A claim for carelessly setting fire to fences and grass is assignable. *Fried v. N. Y. C. R. R. Co.*, 25 How. Pr. 285.

A claim for decreased rental value caused by elevated railroad is not a claim for personal injury, and is assignable. *Birch v. Met. El. Ry. Co.*, 29 St. Rep. 318, 8 N. Y. Supp. 325.

A claim against a sheriff for failing to make a return or for making a false return is assignable. *Jackson v. Daggett*, 24 Hun, 204.

An action against the officers of a corporation to charge them with individual liability is assignable. *Bonnell v. Wheeler*, 16 Abb. Pr. (N. S.) 81; *Pier v. George*, 86 N. Y. 613.

Section 1911 authorizes the transfer of cause of action to cancel an instrument executed as security for usurious loan under certain circumstances, but the person taking the transfer does not succeed to the right to procure relief without paying, or offering to pay, any part of the sum or thing loaned. *Wheelock v. Lee*, 64 N. Y. 242, seems to have been decided previous to the enactment of this provision.

Authorities bearing upon this question are collated in Fiero on Special Actions, pp. 1403-1418.

## ARTICLE XVII.

### RECEIVER, WHEN LIABLE FOR TORT.

In *Cardot v. Barney*, 63 N. Y. 281, it was held that a person acting as receiver of an insolvent railroad corporation running the road, was not personally liable in an action for negligence where no personal neglect was imputed to him, either in the selection of agents or in the performance of any duty, but where the negligence was that of a subordinate employed in compliance with the order of the court.

In *Kain v. Smith*, 80 N. Y. 458, it was sought by counsel to have this rule extended so as to relieve a receiver, as such, from

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liability. The court, however, distinguished the liability of the person acting as receiver in his individual capacity and the liability of the trust fund, holding that damages for injury to the person would be chargeable upon and payable out of the fund in court, the same as other expenses of administration of the trust.

This principle was applied in *Camp v. Barney*, 4 Hun, 373; and in *Graham v. Chapman, Receiver*, 33 St. Rep. 349, 11 N. Y. Supp. 318, it is held that a receiver must be held liable for injuries to his employee, in the same manner and to the same extent as the corporation itself would be held if it had not gone into the hands of a receiver. See also *Durkin v. Sharp*, 88 N. Y. 225; *Fuller v. Jewett*, 80 N. Y. 46.

In a note to 15 L. R. A. 120, attention is called to the fact that *Cardot v. Barney* has not been followed even in this State, and has been severely criticised in other States. It is stated that this decision is probably based upon the fact that the action was brought against the receiver personally.

ARTICLE XVIII.

PLAINTIFF, A WRONGDOER.

Where two or more persons are jointly concerned in wrongdoing, and by the negligent or reckless action of one of them another is injured, the latter is without remedy for the injury. The case may be instanced of persons participating in a riot, or in a smuggling venture, or in illegal sports; an injury which one suffers under such circumstances is as directly traceable to his own breach of the law as to the misconduct of his associate, and any demand made on his part for redress would be based upon a showing of the violation of his own duty to the public. The case of one who is injured in doing an illegal act may be said to be, if possible, still plainer and more just than in a case where the action of the other party is wrongful only because of the negligence. Cooley Elements of Torts, 45.

The fact that a person has committed a wrongful act, while it does not create a duty upon the part of another to exercise diligence to avoid doing harm, does not justify the latter either in malicious or wanton maltreatment or in failing to take reasonable care to avoid harm after he has, or ought to have, knowledge of impending or avertible danger. Hale on Torts, 111.

## Art. 18. Plaintiff, a Wrongdoer.

It does not appear that the plaintiff is debarred from recovering by reason of being himself a wrongdoer, unless some unlawful act or conduct upon his part is connected with the harm suffered by him as part of the same transaction. Pollock on Torts, 206, citing Spring Gun case, *Bird v. Holbrook*, 4 Bing. 628; *Barnes v. Ward*, 9 C. B. 392; *Hooker v. Miller*, 37 Iowa, 613.

The latter case cites *Loomis v. Terry*, 17 Wend. 496, which in turn cites and comments upon the English authorities. And holds that the owner of property has no right to use means endangering the life or safety of a human being for the purpose of protecting property against a mere trespasser; that the principles of humanity must not be violated, or the owner will be subjected to damages for any injury which happens.

A party owes no duty to a trespasser except that he is not justified in subjecting him to any unnecessary hazard. *Clark v. N. Y., L. E. & W. R. R. Co.*, 40 Hun, 605, affirmed in 113 N. Y. 670; *Ansteth v. Buffalo Ry. Co.*, 145 N. Y. 210 (214).

A wrongdoer is not, however, an outlaw, but may justly complain of wanton and malicious negligence. *Tonawanda R. R. Co. v. Munger*, 5 Den. 255 (266, 267).

The law is not so unjust and cruel as to regard a trespasser upon the lands of another as an outlaw, and so the wrongdoer may justly complain if an injury has been done to his person or property intentionally and maliciously. *Boyle v. N. Y., L. E. & W. R. R. Co.*, 39 Hun, 171, affirmed 115 N. Y. 636.

In *Magar v. Hammond*, 171 N. Y. 377, reversing 54 App. Div. 532, 67 N. Y. Supp. 63, the court considers the right of a plaintiff, who is a trespasser, to recover for an alleged negligent act on the part of defendant's servant. The rule of law seems to be assumed that the plaintiff was guilty of wrong in going upon defendant's premises in the manner described, and that defendant owed him no duty except to refrain from intentionally doing him an unnecessary injury, or an injury through wanton or reckless negligence.

A wrongdoer is not without the protection of the law; so held where an action was brought against a common carrier by a passenger for injuries sustained on Sunday. *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126.

In *Merritt v. Earl*, 29 N. Y. 115 (121), it is held, per Johnson, J., that the fact that a contract was made and property delivered on board a vessel on Sunday did not exempt the defendant from liability for loss of the property.

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Where, through culpable omission of duty upon the part of the municipal corporation, a street has become obstructed, and in consequence a traveler upon the street is injured, it is no defense to an action against the municipality to recover damages that the accident happened upon Sunday — and that the person injured was, in traveling on that day, violating the statute relating to the “observance of Sunday.” The courts may not add to the penalty imposed by that statute a forfeiture of the right to indemnity for an injury resulting from defendant’s negligence, and the violation of the statute cannot be regarded as the immediate cause of the injury. *Platz v. City of Cohoes*, 89 N. Y. 219, citing and collating many authorities.

In an action brought to recover damages sustained by plaintiff because of his having been induced to sell meat to defendant by reason of fraudulent representations made by the latter, it was held that the fact that the beef was sold on Sunday presented no reason for vacating an order of arrest against the defendant. *O’Shea v. Kohn*, 33 Hun, 114, affirmed without opinion 97 N. Y. 649.

In an action for personal injuries caused by negligence of the master, the fact that such injuries were sustained while working on Sunday is no defense, where the performance of the work on that day was required by the master. *Solarz v. Manhattan Ry. Co.*, 8 Misc. Rep. 656 (658), 29 N. Y. Supp. 1123, citing the rule from *Cooley on Torts*, 159, that a party violating the law is not on that account put at the mercy of others. Citing numerous authorities in this and other jurisdictions in support of the adjudication, stating that recoveries have been almost uniformly sustained upon contractual relations made in violation of the statutory provision respecting the Sabbath, on the ground that the transgression by the plaintiff was not the proximate cause of the remedy, and comments on the fact that the contract as so made did not justify the injuries complained of, and furnished no defense to the defendants who caused them. Distinguishing it from the class of cases where plaintiff must recover “through the medium and by the aid of an illegal transaction to which he was himself a party.” Affirmed in 11 Misc. Rep. 715, 32 N. Y. Supp. 1149, on opinion below.

While the violation of a statute may be proved as a fact for the consideration of the jury, such violation does not necessarily establish negligence. Where a child remained upon the platform of a street car, in violation of the municipal ordinance, it was held that the plaintiff was not for that reason denied the right to assert



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the defendant's negligence as the cause of the injury, or to charge it with liability for the consequences. *Connolly v. Knickerbocker Ice Co.*, 114 N. Y. 104, citing *Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 488.

The violation of an ordinance is not negligence *per se*, though some evidence of negligence. *Donnelly v. City of Rochester*, 166 N. Y. 315-319.

In *Kiff v. Youmans*, 86 N. Y. 324, it was held, in an action for assault and battery, that when the plaintiff was a trespasser upon the premises of defendant, and the latter, in removing him, used more force than was necessary, the plaintiff was not entitled to recover punitive or exemplary damages, and, although the provocation failed to justify the defendant, yet it might be relied upon by him in mitigation of damages. It is said that the willful and deliberate act which constituted plaintiff a trespasser was the proximate cause of the injury, and, while defendant was bound to confine the force used by him within reasonable bounds, yet the plaintiff was guilty of the act which led to the disturbance of the peace.

An action for negligence cannot be sustained for the wrongful act of the plaintiff, co-operating with the misconduct of the defendant, to produce the damages sustained. This is so whether the plaintiff's act be negligent or willful. *Tonawanda R. R. Co. v. Munger*, 5 Den. 255.

**ARTICLE XIX.****JOINT TORT FEASORS.**

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**SUBDIVISION 1.****Wrongdoers Are Jointly and Severally Liable.**

A tort feasor is defined (Bouv. L. Dict., cited Am. & Eng. Encyc. of Law) as a wrongdoer, "One who commits or is guilty of a tort."

Where two or more persons participate in concerted action to commit a common tort, they are called "joint tort feasors." Hale, 120.

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All who contribute to a tort, even by their wills alone, especially, therefore, all who contribute by their acts, even though in an inferior degree, are, whether they are personally present or absent at the doing, liable to the person injured, each for the entire damage, and it cannot be apportioned. Bishop on Non-Contract Law, p. 231.

Cooley says ("Elements of Torts," p. 38), the person wronged may treat all concerned in the injury as one party, and if he proceeds against them jointly, he is not bound to point out how much of the whole is attributable to one, and how much to another. Neither is the jury to make any apportionment by their verdict.

The master who commands a trespass and the servant who commits it; the master who authorizes false representations and the servant who makes it; and, generally, the master who authorizes a wrong and the servant who does the wrong, are responsible as joint tort feasors. Hale on Torts, p. 141, citing *Bates v. Pilling*, 6 B. & C. 38.

In *Livingston v. Bishop*, 1 Johns. 289, Kent, Ch. J., lays down a rule which has been cited and followed. He says (p. 290): "On looking into the books, with a view to this question, I was surprised to meet with so much contradiction and uncertainty on the subject. The cases are not all capable of being reconciled to each other, and some of them appear to me not reconcilable with reason. It is, however, a proposition that is not controverted, but everywhere admitted, that for a joint trespass the plaintiff may sue all the trespassers jointly, or each of them separately, and that each is answerable for the act of all. It would seem to result from this doctrine, that a trial and recovery against one trespasser is no bar to a trial and recovery against another. If there can be but one recovery, it is in vain to say that the plaintiff may bring separate suits, for the cause that happens to be first tried, may be used by way of plea *puis darrein continuance*, to defeat the other actions. The more rational rule appears to be, that where you elect to bring separate actions for a joint trespass, you may have separate recoveries, and but one satisfaction; and that the plaintiff may elect *de melioribus damnis*, and issue his execution accordingly; and that where he has made this election he is concluded by it, and if he should afterward proceed against the other defendants, they shall be relieved, on payment of their costs."

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In *Williams v. Sheldon*, 10 Wend. 654, which has been frequently cited and followed, it is held that where several individuals act in concert in entering upon a lot of land and cutting and carrying away timber, they are jointly liable in an action in trespass, although they did not participate as partners, share and share alike, in the avails of the trespass.

"Where separate and independent acts of negligence of two parties are the direct causes of a single injury to a third person and it is impossible to determine in what proportion each contributed to the injury, either is responsible for the whole injury; and this, although his act alone might not have caused the entire injury, and although, without fault on his part, the same damage would have resulted from the act of the other." *Slater v. Mersereau*, 64 N. Y. 138.

In *Wolf v. American Tract Society*, 164 N. Y. 30, an action was brought against two contractors upon a building upon which nineteen independent contractors were engaged. It was held that each contractor was responsible only for the negligence of his own servants or employees; that, as the person who caused the injury was not identified by the proof, the master, who was responsible, could not be identified. The court says that it follows that either the plaintiff's action must fail for want of proof, or it must be held that any or all of the contractors together might be held responsible for the injury. Concluding that the latter proposition could not be defended on principle and that the action could not be maintained, no case having been made out against the two contractors who were originally joined as defendants. "The idea that all or any of the nineteen contractors might be held since the plaintiff is unable by proof to identify the real author of the wrong is born of necessity, and embodies a principle so far reaching and dangerous that it cannot receive the sanction of the court."

As to what action by directors of a corporation in wasting its funds constitutes them joint tort feasors, when wrongdoers are not entitled to compel contribution, or enforce subrogation, and when joint tort feasors are not released, see *Gilbert v. Finch*, 173 N. Y. 455, affirming 72 App. Div. 38, 76 N. Y. Supp. 143.

For further citations of authority on this point, see "Remedies," "Joinder of Defendants."

Where plaintiffs have exercised a controlling authority over

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the action of a sheriff in procuring the consummation of the wrong complained of, they make themselves liable as principals, for an original, unlawful taking by the sheriff, and are jointly and severally liable with the sheriff for the damages occasioned by a trespass; and plaintiff may sue one or more such defendants, and it is not a defense that there were other persons liable for the same trespass, but were not joined as defendants; nor can parties who are jointly and severally liable for damages arising out of an unlawful taking of property, by any arrangement between themselves, prejudice the rights of an injured party in the prosecution of those who committed the trespass. *Dyett v. Hyman*, 129 N. Y. 351 (356).

When several persons unite in the publication of one libel, a tort is committed by each one of them, for which he is severally liable to the plaintiff, and the plaintiff is entitled to a judgment against each one and for all the damages which he suffers by reason of the libel; although he is entitled to but one satisfaction, until he has had that satisfaction, he is entitled to maintain as many actions for the same libel as there are defendants who have been engaged in publishing it. *Palmer v. New York News Publishing Co.*, 31 App. Div. 210 (212), 52 N. Y. Supp. 539.

The rule, however, is: Where different parties pollute a stream by the discharge of sewerage therein, each from his own premises, and each acting separately and independently of the others, one of the number is not liable for all the injury suffered by another, because of the nuisance thus created; each is liable only to the extent of the wrong committed by him. The authorities holding that where a direct personal injury is occasioned by the separate and concurring negligence of two or more parties, an action against one or all will lie, and those holding that an equitable action will lie, to restrain parties who are severally contributing to a nuisance are distinguished. *Chipman v. Palmer*, 77 N. Y. 51.

This case is distinguished in *Simmons v. Everson*, 124 N. Y. 319, which holds that persons who, by their several acts or omissions, maintain a public or common nuisance, are jointly or severally liable for such damages, as are the direct, immediate, and probable consequences of it.

Where two parties act negligently in a manner and to a degree contributing to the result, they are liable jointly and severally. *Barrett v. Third Ave. R. R. Co.*, 45 N. Y. 628, citing *Webster v. Hudson R. R. Co.*, 38 N. Y. 260.

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A passenger injured by a collision resulting from a concurrent negligence of two railroad corporations may maintain a joint action against both. *Colegrove v. N. Y. & N. H. R. R. Co.*, 20 N. Y. 492. See also *Pollett v. Long*, 56 N. Y. 200 (205); *Arctic Fire Ins. Co. v. Austin*, 69 N. Y. 470 (483).

The rule as to liability of joint tort feasors does not seem to apply to cases of injuries done by animals belonging to different owners, although the animals acted in concert in doing the injury and the precise damage done by each cannot be ascertained. Each owner seems to be liable only for the mischief done by his own dog, and a joint action against the several owners for the injury done by all the dogs will not lie. *Van Steenburgh v. Tobias*, 17 Wend. 562; *Auchmuty v. Ham*, 1 Den. 495; *Carroll v. Weiler*, 1 Hun, 605; s. c., 4 T. & C. 131.

These cases are cited as being exceptions to the general rule in *Slater v. Mersereau*, 64 N. Y. 138 (147), which case holds that where separate and independent acts of negligence of two parties are the direct causes of a single injury to a third person, it is impossible to determine in what proportion each contributed to the injury; either is responsible for the whole injury, and this although his act alone might not have caused the entire injury, and although, without fault on his part, the same damage would have resulted from the act of the other. Citing as analagous *Colegrove v. N. Y. & N. H. R. R. Co.*, 20 N. Y. 49; *Webster v. H. R. R. Co.*, 38 N. Y. 260.

## SUBDIVISION 2.

## One Satisfaction Only Can be Had.

*Livingston v. Bishop*, 1 Johns. 290, and *Thomas v. Rumsey*, 6 Johns. 26, are followed in *Breslin v. Peck*, 38 Hun, 623, holding that the plaintiff can have but one satisfaction for a tort, although suit may be brought against joint tort feasors jointly or separately. The court, per Rumsey, J., says that the reason is that "however numerous may be the doers of the tortious act, the tort itself, as well as the damage caused by it, is but one single thing, for which but one single payment by whomsoever of the trespassers made, is a perfect satisfaction. It is said that for the same reason if in an action against several joint trespassers the plaintiff releases one, all are discharged, and this is so although the party giving the release stipulates it shall not discharge the other.

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The latter proposition is reiterated in *Conde v. Hall*, 92 Hun, 337, 37 N. Y. Supp. 411, opinion Vann, J., citing *Lord v. Tiffany*, 98 N. Y. 412, upon same point; *Brogan v. Hanan*, 55 App. Div. 92, and cases cited, p. 93, 66 N. Y. Supp. 1066.

*Woods v. Pangburn*, 75 N. Y. 495 (498): "There can be but one recovery against the same person for the same cause of action (*Sheldon v. Carpenter*, 4 N. Y. 579); and there can be but one satisfaction got from several persons for the same cause of action; that is, for a single injury, though there may be several recoveries. *Thomas v. Rumsey*, 6 Johns. 26; *Livingston v. Bishop*, 1 Johns. 290. Two may join in one wrongful act, and the injury is single, though their act is joint; and there can be but one satisfaction therefor, though there may be two actions brought, and a recovery in each."

Satisfaction by one joint tort feasor has always been held to be available as a bar to an action against another. This rule applies with equal reason to a partial satisfaction by one of the wrongdoers for the damages occasioned by the joint wrongful act of both. Such evidence is proper in mitigation of damages, and under the former practice was admissible under the general issue. *Knapp v. Roche*, 94 N. Y. 329 (334), and authorities cited.

Where there is joint indebtedness (not a joint and several) a judgment recovered against two or more joint tort feasors merges the original debt in the higher security of the judgment and no action can thereafter be maintained against any of the other defendants, even though no satisfaction is received of the judgment against the one debtor. But a judgment against one wrongdoer, unsatisfied, is not a bar to the maintenance of an action against the other. *Russell v. McCall*, 141 N. Y. 437 (450).

Although a plaintiff may have a verdict and judgment in separate actions against joint tort feasors, he can have but one satisfaction which is operative as to both, but he may have, however, the costs in all the actions, but when these several sums are paid, neither the principal debtor nor his surety should be further vexed. *Lord v. Tiffany*, 98 N. Y. 412 (421).

A judgment against one joint trespasser is no bar to a suit against another for the same trespass; nothing short of full satisfaction, or that which the law must consider as such, can make such judgment a bar. Part payment upon the judgment is not full satisfaction. *Lovejoy v. Murray*, 3 Wall. 1, cited and fol-

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lowed in *The Atlas*, 93 U. S. 315; *The Beaconsfield*, 115 U. S. 303; *Birdsell v. Shaliol*, 112 U. S. 489.

If, after recovery and satisfaction for one slanderous utterance or libelous publication, the same defamatory matter is uttered or published again by the wrongdoer, this is a new injury and another cause of action, and there may be another recovery and satisfaction from him. So if, after a recovery against two jointly, one of them repeats the wrong, there may be another recovery, and a satisfaction of the former recovery is not a satisfaction of the latter. *Woods v. Pangburn*, 75 N. Y. 495.

## SUBDIVISION 3.

## No Contribution between Wrongdoers.

If one of several persons liable for a wrong is proceeded against and compelled to make reparation, the law will give him no assistance in securing contribution from the others. *Cooley Elements of Torts*, 42, citing *Merryweather v. Nixan*, 8 T. R. 186.

Equity will not interpose to enforce a contribution between wrongdoers, especially where they do not stand in equal right, or there is not equal equity between them. *Peck v. Ellis*, 2 Johns. Ch. 130, 131, citing English authorities to the proposition that a court of law will not sustain an action between two joint trespassers for contribution.

Wrongdoers are not entitled to claim of contribution against each other, although the party injured obtained full satisfaction for his damages, or a part of them only. *Miller v. Fenton*, 11 Paige, 18.

The rule holds in equity as well as at law that there shall be no right in contribution between joint wrongdoers. This rule is founded in public policy and intended to check the disposition to combine in committing rights by declaring each individual concerned is liable to bear the whole loss or damage which may be occasioned; and if a servant or agent commits a trespass ignorantly upon an express promise of indemnity, the promise may be enforced, but if the wrongdoer knows the act to be unlawful he cannot enforce the promise. *Pierson v. Thompson*, 1 Edw. Ch. 212; *Coventry v. Barton*, 17 Johns. 141.

That equity will not interfere to enforce contribution between wrongdoers is also held in *Thorp v. Amos*, 1 Sandf. Ch. 26 (34); *Andreus v. Murray*, 33 Barb. 354 (365).

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The policy of the law is to leave wrongdoers without aid in equity from burdens of the position in which they have placed themselves. The rule is well settled that as among themselves equity will not compel contribution or enforce subrogation. *Gilbert v. Finch*, 173 N. Y. 455 (462).

In *Jacobs v. Pollard*, 10 Cush. 287, the question is considered as to contribution among the joint tortfeasors when they neither know, nor can be presumed by law to know, that a legal wrong was being committed, citing numerous authorities. Bigelow, J., says: "It has, therefore, been held that the rule of law, that wrongdoers cannot have redress or contribution against each other, is confined to those cases where the person claiming redress or contribution knew, or must be presumed to have known, that the act for which he has been mulcted in damages was unlawful. Lord Kenyon, in the leading case of *Merryweather v. Nixan*, 8 T. R. 186, suggests this distinction, which the recent cases have more fully developed, and the rule is now always held subject to the limitations above stated. *Betts v. Gibbins*, 2 A. & E. 57, 65 (29 E. C. L. 47); *Pearson v. Skelton*, 1 M. & W. 504; *Adamson v. Jarvis*, 4 Bing. 72 (13 E. C. L. 403); *Wooley v. Battle*, 2 C. & P. 417 (12 E. C. L. 649); *Humphreys v. Pratt*, 2 Dow. & Cl. 288, 2 Saund. Pl. & Ev. (2d ed.) 413, 414; *Coventry v. Barton*, 17 Johns. 142; *Avery v. Halsey*, 14 Pick. 174. See also *Battersey's Case*, Winch. 49.

In dissenting opinion, per Folger, J., in *Jones v. Barlow*, 62 N. Y. 202, it is said that there is no contribution among wrongdoers. But the rule is not applied where one is a tortfeasor only by inference of law and is confined to cases where one knows, or is presumed to know, that he is committing an unlawful act.

Where damages are not capable of exact pecuniary measurement, but must be left to the discretion of the jury, evidence of the circumstances of the wrong addressed to the jury for the purpose of influencing its estimate is said to be in aggravation or mitigation of damages. Hale on Damages, 107.

This view is sustained in *Nashua Iron & Steel Co. v. Worcester, etc., N. R. Co.*, 62 N. H. 159, cited in Cooley Elements of Torts, 43; *Avery v. Halsey*, 14 Pick. 174; *Gray v. Boston Gas Light Co.*, 114 Mass. 149; *Churchill v. Holt*, 127 Mass. 165, 131 Mass. 67; *Armstrong County v. Clarion County*, 66 Pa. St. 218, cited in Hale on Torts, 124. See *Coventry v. Barton*, 17 Johns. 142;



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*Nelson v. Cook*, 17 Ill. 443; *Atkins v. Johnson*, 43 Vt. 78, 5 Am. Rep. 260.

There are many cases in which though two or more persons are wrongdoers in contemplation of the law as between themselves and third person, yet only one of them was in fault for the injury done, and if another has been compelled to make compensation his claim to indemnity from the one for whose fault he has paid may be perfectly reasonable and just. Cooley Elements of Torts, 43, citing *Mainwaring v. Brandon*, 8 Taunt. 202; *Smith v. Foran*, 43 Conn. 244, 21 Am. Rep. 647.

In *Gilbert v. Finch*, 173 N. Y. 455, the liability of joint tort feasors is considered, and it is held that wrongdoers are not entitled to compel contribution or to enforce subrogation. The effect of release of one of the joint tort feasors is considered, and it is held (pp. 463, 466) that in England the modern authorities are uniform upon this question to the effect that as between joint debtors and joint tort feasors a release given to one releases all, but if the instrument contains a reservation of the right to sue the other joint debtor or joint tort feasor, it is not a release, but in effect is a covenant not to sue the person released, and a covenant not to sue does not release a joint debtor or a joint tort feasor. That the decisions in this State are in accord with the English rule and in harmony with our statute in reference to joint debtors.

## CHAPTER V.

### EXEMPTION FROM LIABILITY.

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#### ARTICLE I.

##### ACTS OF STATE.

It may be stated as a general rule that if the legislature, acting within its constitutional limitations, directs or authorizes the doing of a particular thing, the doing of it in the authorized way and without negligence cannot be wrongful; if damage results as a consequence of its being done, it is *damnum absque injuria*, and no action will lie for it. 8 Am. & Eng. Encyc. of Law, 697.

"It may be accepted as a point of departure unquestioned," said Mr. Justice Miller, in *Cunningham v. Macon & Brunswick R. R. Co.*, 109 U. S. 446, 451, "that neither a State nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution." Cited in *Hans v. Louisiana*, 134 U. S. 1 (17).

It is held in the same case, citing *Curran v. Arkansas*, 15 How. Pr. 304; *Clark v. Barnard*, 108 U. S. 436, that a State may be sued by its own consent. To the same point is *Beers v. Arkansas*, 20 How. 527, opinion Chief Justice Taney; *Railroad Co. v. Tennessee*, 101 U. S. 337; *Railroad Co. v. Alabama*, 101 U. S. 832; *In re Ayers*, 123 U. S. 433.

The language of Chief Judge Taney in *Beers v. State of Ar-*

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*kansas*, 20 How. 527 (529), above referred to, is as follows: "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit will be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it."

A State can only be sued by its own consent, and for liabilities which it chooses to assume. *Rexford v. State of New York*, 105 N. Y. 229 (231), citing *People v. Denison*, 84 N. Y. 272, 281.

And this has been expressly held where the cause of action rested upon some misfeasance or nonfeasance. *Lewis v. State*, 96 N. Y. 71.

It is said in *Stone v. State*, 138 N. Y. 124 (130), opinion Andrews, Ch. J., "In the absence of statutory authority extending the jurisdiction of courts to the determination of claims against the State, an appeal to the legislature is the only remedy of the citizen against the sovereign, whether the claim arose in consequence of wrongful acts of State officers or agents, or upon contracts made under authority or in behalf of the State."

In *Locke v. State*, 140 N. Y. 480, at p. 481, Judge O'Brien, in the prevailing opinion, says: "The sovereign cannot be impleaded nor made liable for damages for any cause whatever in the courts of justice, save in such case as it has itself consented to be made liable." Citing *Sipple v. State*, 99 N. Y. 284; *Bowen v. State*, 108 N. Y. 166; *Splittorf v. State*, 108 N. Y. 205.

"It being lawful for the sovereign to exercise its lawful power it must follow that whatever results from its proper exercise is not unlawful, and if any injury, direct or consequential, results to the individual, he is remediless, except so far as the sovereign gives him a remedy." *Benner v. Atlantic Dredging Co.*, 134 N. Y. 156 (161); *Slingerland v. International Contracting Co.*, 169 N. Y. 61.

Neither the Federal nor the State government is liable for the unauthorized torts of its officers. 15 Encyc. of Law (1st ed.).

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p. 514, citing Story on Agency, § 319; Mechem on Public Officers, § 849.

The government does not undertake to guarantee to any person the fidelity of the officers or agents whom it employs since that would involve it in all its operations in endless embarrassments, difficulties, and losses which would be subversive of the public interests. Story on Agency, § 319, quoted by Justice Miller in opinion of the court in *Gibbons v. United States*, 8 Wall. 269 (274).

Torts committed by an officer in the service of the United States do not render the government liable in an implied assumpsit, even though the acts done were apparently for the public benefit. *Whiteside v. United States*, 93 U. S. 247 (257), citing *Gibbons v. United States*, 8 Wall. 274. *Bates v. Clark*, 95 U. S. 204; *Hart v. United States*, 95 N. Y. 316.

Negligence on the part of officers of the United States government gives no right of action against the government. *United States v. Whitton*, 143 U. S. 76, citing *Minturn v. United States*, 106 N. Y. 437.

It is a well-settled rule of law that the government is not liable for the nonfeasance or misfeasance or negligence of its officers, and the only remedy of the injured party in such cases is by appeal to Congress. *German Bank v. United States*, 148 U. S. 573.

The United States have not consented to be liable to suits founded in tort for wrongs done by their officers in the discharge of their official duties. *Belknap v. Schild*, 161 U. S. 10; *Hart v. United States*, 95 U. S. 316, and cases cited; *Moffatt v. United States*, 112 U. S. 24.

Nor can a State be made liable for injuries arising from the negligence of its agents or servants, except by force of some positive statute assuming such liability. *Sipple v. State*, 99 N. Y. 284 (287); *Splitstorf v. State of New York*, 108 N. Y. 205 (212).

The opinion calls attention to the jurisdiction of the Board of Claims relative to canal damages. Section 37 of the Canal Law (Gen. Laws, chap. 12) provides for submission to the Court of Claims of damages arising from the use and management of canals, etc. The State has also provided, through the Court of Claims, a tribunal having the powers and jurisdiction of the former Board of Claims, against the State. The court has jurisdiction to hear and determine a private claim against the State which shall have accrued within two years before the claim is filed, etc.,

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and provides a rule of liability where jurisdiction is given to hear and determine the claim by special law. Code Civ. Proc., § 264 *et seq.*

So firmly is the doctrine established that the State cannot be sued without its consent, that in *People of the State of New York v. Denison et al.*, 84 N. Y. 272, it was held that while the government may, through its courts, enforce its claims against its citizens, this right is not reciprocal. A set-off is in the nature of a cross-action, and the government cannot be sued except by its own express permission. That in an action brought by the people of the State counterclaim cannot be allowed. It is said, citing 19 Wall. 239, that authority to render a judgment against the State or government in one of its own courts cannot be implied, but must be expressed. Nor can it be claimed under general laws in which the State is not named.

Acts done by a municipal corporation in complying with a statutory enactment are *damnum absque injuria*, although resulting in injury to individuals affected thereby. *Muhlker v. N. Y. & H. R. R. Co.*, 173 N. Y. 549, reversing 60 App. Div. 621, discussing and distinguishing the *Lewis Case*, 162 N. Y. 202, and following the *Fries Case*, 169 N. Y. 270. See *Dolan v. N. Y. & H. R. R. Co.*, 175 N. Y. 367.

Followed *People v. Corner*, 59 Hun, 299, 12 N. Y. Supp. 936, distinguishing *Danolds v. State*, 89 N. Y. 36, is affirmed without opinion, 128 N. Y. 640, and cited and followed in *People ex rel. Western Union Co. v. Roberts*, 30 App. Div. 78 (81), 51 N. Y. Supp. 747, affirmed on opinion below, 156 N. Y. 693.

*Corbett v. St. Vincent's Industrial School*, 79 App. Div. 334, collating the authorities (p. 349), arrives at the conclusion that the State is not liable for an injury sustained by an inmate of any of its prisons, reformatories, or other institutions, which is the result of negligence.

As to the right to sue foreign powers, Hale on Torts, 71, lays down the rule (citing authorities) as follows: "As a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence of every other sovereign State, each and every one declines to exercise, by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any

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 Art. 2. Chief Executive and Members of Legislative Bodies.
 

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State which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement subject to its jurisdiction," citing *Manning v. State of Nicaragua*, 14 How. Pr. 517.

The right of ambassadors and consuls with regard to freedom from attachments and orders of arrest is considered in *Matter of Aycinena*, 3 N. Y. Super. 690; *Holbrook v. Henderson*, 6 N. Y. Super. 619; as to freedom from examination in supplementary proceedings, *Griffin v. Dominguez*, 9 N. Y. Super. 656. A consul of a foreign government is not liable to be sued in the State courts — whenever the fact appears that the court has no jurisdiction it will stop the proceedings in a cause at any stage of its progress. *Valarino v. Thompson*, 7 N. Y. 576.

## ARTICLE II.

### CHIEF EXECUTIVE AND MEMBERS OF LEGISLATIVE BODIES.

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#### SUBDIVISION 1.

##### Immunity of Chief Executive.

The gist of the authorities upon this subject is stated in 14 Am. & Eng. Encyc. of Law, 1106, as follows: "The governor of a State, as representing the executive branch of the State government, is generally entitled to that immunity from encroachment by either the judicial or the legislative branches which is derived from that fundamental theory of American constitutions known as the separation of powers."

The executive of the nation and the governors of the several States are exempt from responsibility to individuals for their official utterances. Cooley (2d ed.), 250.

The character and extent of the immunity of the chief executive from suits or proceedings relating to the performance of his duties was very fully considered in the celebrated case of *Marbury v. Madison*, opinion Chief Justice Marshall, 1 Cranch, 137, who expressly disclaims the view that any interference is intended with the prerogatives of the executive and repudiates the idea that the

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courts will intermeddle with the manner in which executive officers perform their duties.

In *People ex rel. Broderick v. Morton*, 156 N. Y. 136, it is held that the courts of this State cannot compel the performance by the governor of a duty imposed upon him by his office, and that this inability extends to ministerial duties as well as those involving executive judgment and discretion, and to action by the governor as an *ex officio* member of a board of public officers, citing numerous authorities upon the question as to whether the courts can compel the governor to perform a ministerial act and quoting largely from *Sutherland v. The Governor*, 29 Mich. 320.

### SUBDIVISION 2.

#### Members of Legislative Bodies.

No member of a legislative body can be called to account for acts done in or in connection with the exercise of his legislative powers. Bishop, § 777, citing *Stockdale v. Hansard*, 9 A. & E. 1 (110, 113, 114). It is not permissible to raise the question whether what legislators said or wrote was pertinent to what was before them for official action. Cooley, 250.

It is provided by section 12 of article 3 of the Constitution that for any speech or debate in either house of the legislature, the members shall not be questioned in any other place.

The Constitution of the United States also provides that senators and representatives shall not be questioned in any other place for any speech or debate in either house. This provision was invoked in *Kilbourne v. Thompson*, 103 U. S. 168 (201), and it was held that this provision exempted members of Congress from liability elsewhere for any vote on a report to, or action in, their respective houses, as well as for oral debate. This case was cited and commented upon in *People ex rel. McDonald v. Keeler*, 99 N. Y. 463, upon the question as to right of legislative body to punish for contempt.

The immunity of legislators is very fully considered by Chief Judge Parsons in *Coffin v. Coffin*, 4 Mass. 1. The conclusion of the court in that case as given in Pattee's Illustrative Cases on Torts is, "The members of the legislature, while acting in their official capacity, are exempt from liability for all acts said or done, though such statement and acts be in violation of the rules of legislative bodies."

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Great immunity is attached to words spoken or written in the due course of parliamentary proceedings. *Woods v. Wiman*, 47 Hun, 362 (365).

The law affords immunity from any action for damages on account of the defamatory character or effect of words spoken or written in the course of parliamentary proceedings. *Perkins v. Mitchell*, 31 Barb. 461 (468).

It is said that members of legislative bodies, such as boards of supervisors, county commissioners, city councils and the like, are not liable for their acts or neglects. Cooley (2d ed.), 443, citing *Baker v. State*, 27 Ind. 485; *Morris v. People*, 3 Den. 381.

### ARTICLE III.

#### JUDICIAL AND QUASI-JUDICIAL OFFICERS AND PROCEEDINGS.

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##### SUBDIVISION 1.

##### Judicial Officers and Proceedings.

No action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice. Pollock, 138, quoting *Scott v. Stansfield*, L. R. 3 Exch. 220. The American note adds that the text substantially states the American rule.

No judicial person, whether a judge of a Supreme Court, a justice of the peace, or other inferior magistrate, a member of a court-martial, or a juror is for any judicial act within his jurisdiction, however erroneous, mistaken, or even corrupt, answerable in a civil suit to the party aggrieved. They are liable in certain cases to impeachment. Bishop, §§ 781, 782.

No action for damages can be maintained against a person for anything said or done in the discharge of a judicial duty except it be an action for false imprisonment. Bigelow on Torts, 30, citing *Chatterton v. Secretary of State*, 1895, 2 Q. B. 189; *Spalding v. Vilas*, 161 U. S. 183.

No judicial officer invested with power to imprison is liable to an action for false imprisonment, unless he acted beyond his jurisdiction. Underhill, 283.

Jurisdiction of the subject-matter is power lawfully conferred to



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 Art. 3. Judicial and Quasi-Judicial Officers and Proceedings.
 

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adjudge concerning the general question involved, to act upon the general abstract question, and to decide whether particular facts call for the exercise of the abstract power, but it does not depend upon the ultimate existence of a good cause of action in the particular case. Parker, Ch. J., in *O'Donoghue v. Boies*, 159 N. Y. 87 (109), citing *Hunt v. Hunt*, 72 N. Y. 217; *Bergman v. Wolff*, 33 St. Rep. 499, 11 N. Y. Supp. 591; *Jordan v. Van Epps*, 85 N. Y. 436; *Lange v. Benedict*, 73 N. Y. 12.

It is said in *Piper v. Pearson*, 2 Gray, 120, that, "In all cases, therefore, where the cause of action against a judicial officer, exercising only a special and limited authority, is founded on his acts *colore officii*, the single inquiry is whether he has acted without any jurisdiction over the subject-matter, or has been guilty of an excess of jurisdiction. By this simple test, his legal liability will at once be determined. 1 Chit. Pl. (6th Am. ed.) 90, 209, 213; *Beaurain v. Scott*, 3 Campb. 388; *Eckerley v. Parkinson*, 3 M. & S. 425, 428; *Borden v. Fitch*, 15 Johns. 121; *Bigelow v. Stearns*, 19 Johns. 39; *Allen v. Gray*, 11 Conn. 95. If a magistrate acts beyond the limits of his jurisdiction, his proceedings are deemed to be *coram non judice* and void; and if he attempts to enforce any process founded on any judgment, sentence, or conviction in such case, he thereby becomes a trespasser. 1 Chit. Pl. 210; 19 Johns. 39."

In *Yates v. Lansing*, 5 Johns. 282, 291, Kent, Ch. J., said: "The doctrine which holds a judge exempt from a civil suit or indictment for any act done or omitted to be done by him, sitting as a judge, has a deep root in the common law. It is to be found in the earliest judicial records, and it has been steadily maintained by an undisputed current of decisions in the English courts, amidst every change of policy, and through every revolution of their government."

This was followed by *Yates v. Lansing*, 9 Johns. 394, in the Court of Errors, where it was held that a judge of a court of record is not liable to answer personally in a civil suit for any act done by him in his judicial capacity, nor for errors of judgment.

Where the court has jurisdiction of the person of the delinquent, and of the subject-matter, its members are not answerable for their sentence in an action at the suit of the party. So held as to members of a court-martial, where the party arrested had waived objection to the jurisdiction of the court by pleading guilty. *Van derheyden v. Young*, 11 Johns. 150.

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In *Tompkins v. Sands*, 8 Wend. 462, the rule was laid down that for a judicial act no action lies, but for the injury arising from the misfeasance or nonfeasance of a ministerial officer, the party has redress in an action.

*Weaver v. Devendorf*, 3 Den. 117, holds that a public officer is not responsible in a civil suit for a judicial determination in a matter over which he had jurisdiction, however erroneous it may be, or however malicious the motive which produced it. This rule is to apply only where the judge or officer has jurisdiction and is authorized to determine that fact; if he transcends the limits of his authority, he ceases to act as judge, and is responsible for consequences, citing a large number of English authorities.

This rule is followed in *East River Gas Light Co. v. Donnelly*, 93 N. Y. 557.

A very careful consideration of this question was had upon very full briefs of counsel, citing numerous authorities, in *Lange v. Benedict*, 73 N. Y. 12, where it is said that the subject has been much considered and the principles well settled; and that the difficulty in disposing of a particular case is not, in finding the rule of law upon which it is to be decided, but in determining on which side of that rule the facts of the case lie. The court cites with approval *Bradley v. Fisher*, 13 Wall. 351, holding that judges of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously and corruptly.

It is held that in order that a judge may be free from liability for his act, it must have been done in his judicial capacity and must have been a judicial act, leaving the question to be determined when an act is done as a judge and when it is performed in a judicial capacity. The court states the question to be considered as follows (p. 28): "The inquiry then, at this stage of our consideration of the case, is this: Whether the defendant, sitting upon the bench of the Circuit Court, and being on that occasion *de jure et de facto* the Circuit Court, and having as such jurisdiction of all persons by law within the power of that court, and jurisdiction of all subject-matters within its cognizance; whether he had jurisdiction of the person of the plaintiff, and of any subject-matter wherefrom he had authority to hear and adjudge whether the facts in the case of the plaintiff, as then presented to him, fell within any of those subject-matters. It is not the in-

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quiry whether the act then done as the act of the court was erroneous and illegal; that is but another form of saying whether it could or could not be lawfully done as a court by the person then sitting as the judge thereof. It is whether that court then had the judicial power to consider and pass upon the facts presented, and to determine and adjudge that such an act based upon them would be lawful or unlawful." Appeal dismissed, 99 U. S. 68.

The question is again considered in *Austin v. Vroman*, 128 N. Y. 229, collating the authorities, and it is held that a determination by a judge, whether his jurisdiction had ceased in a particular case or not, is not such an erroneous decision as renders him liable to an action. It is said that his erroneous decision, while conferring no jurisdiction upon him, is still such a judicial determination of the matter already pending before him, and over which up to a certain time he had jurisdiction, that he must be protected from a civil action in regard to it.

In *Handshaw v. Arthur*, 9 App. Div. 175, 41 N. Y. Supp. 61, affirmed 161 N. Y. 664, on opinion below, *Austin v. Vroman*, 128 N. Y. 229, was followed. It is said, citing *Jones & Crawford v. Reid*, 1 Johns. Cas. 20, that the sound rule of construction in respect to the courts of justices of the peace is to be liberal in reviewing their proceedings as far as respects regularity and form, and strict in holding them to the exact limits of jurisdiction prescribed to them by the statute. The principal case holds that as the justice has jurisdiction both of the subject-matter and of the parties, a judgment and execution, although erroneous and voidable, were not void, and the justice was entitled to protection as in an ordinary case of judicial error. *Horton v. Auchmoody*, 7 Wend. 200, is cited with approval.

A very full note on this question, citing numerous authorities, will be found in *Case v. Shepard*, 2 Johns. Cas. 27, at p. 28, where authorities are cited to the proposition that where a court has jurisdiction of the cause and proceeds erroneously, an action does not lie. That nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so, and on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged.

In *Rutherford v. Holmes*, 66 N. Y. 368, it was held that a justice was liable in an action for false imprisonment at the suit of

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one imprisoned in pursuance of his warrant for commitment for contempt, where the justice exceeds his jurisdiction. The court said that the fact that a justice of the peace "had jurisdiction of the person of the plaintiff and of the subject-matter then pending, did not give him judicial authority to adjudge her guilty of a contempt and to imprison her therefor. To have that authority there must have arisen before him facts which gave him power to consider the question whether there had been a contempt committed by her. When facts arose which gave him that power, he had a right to adjudicate upon them, and is not liable to an action, though he may have held erroneously as matter of law."

The latter case does not appear to be referred to in the opinion in *Austin v. Vroman*, 128 N. Y. 229.

A justice is liable for damages for an unauthorized entry of judgment. *Earl v. Brewer*, 20 Misc. Rep. 437, 46 N. Y. Supp. 527. But is not liable because of failure to render judgment in an action tried before him within four days after its final submission. *Evarts v. Kiehl*, 102 N. Y. 296.

See *McGuckin v. Wilkins*, 75 App. Div. 167, holding that a judicial officer, so far as his duties are ministerial, is required to exercise reasonable diligence in the discharge thereof, but he is not required at his peril to meet engagements. Holding further that a justice of the peace was, under the circumstances, not guilty of negligence in failing to attend upon the adjourned day, so as to render him liable in damages to the plaintiff. s. c., 11 Annot. Cas. 216. Followed by note on "Action for damages from neglect in discharging official duties."

### SUBDIVISION 2.

#### Quasi-Judicial Officers and Proceedings.

Quasi-judicial functions are those which lie midway between the judicial and ministerial ones. The lines separating them are necessarily indistinct. When the law, in words or by implication, commits to any officer the duty of looking into facts, and acting upon them, not in a way which it specifically directs, but after a discretion, in its nature judicial, the function is termed quasi-judicial; and he is responsible to one injured by his wrongful act only if it is negligent or malicious, or both. Bishop, §§ 785, 786.

17 Am. & Eng. Encyc. of Law (2d ed.), 887, quotes from *School*

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*District No. 2 v. Lambert*, 28 Oreg. 209, as follows: "Where the law authorizes a person to hear and determine issues between parties, the granting or refusal of relief demanded therein is a *judicial* act, but where a power vests in judgment or discretion, so that it is of a *judicial* nature or character, but does not involve the exercise of the functions of a judge, or is conferred upon an officer having no authority of a *judicial* character, the expression used is generally *quasi-judicial*; so that where, in the exercise of a power, an officer is vested with a discretion, his act is regarded as *quasi-judicial*."

An officer who acts judicially for the time being is considered a judicial officer, although he may also perform ministerial duties. In order to be entitled to this protection, however, the officer must act within his jurisdiction, in good faith, without fraud or malice, and the burden of proof is on the plaintiff to show that the officer acted maliciously and in bad faith. 19 Am. & Eng. Encyc. of Law (1st ed.), 486.

Nelson, J., in *Easton v. Calender*, 11 Wend. 91 (93), says, in speaking of the extent of liability of *quasi-judicial* officers that if they confine themselves within the limits of the statute, though they may err in point of law or judgment, they should not be either civilly or criminally answerable if their motives are pure. This is the rule applicable to public officers, bound to exercise their deliberative judgment in the discharge of their official duties, and is applicable to all inferior magistrates, and others called to the performance of functions in their nature and character judicial, while acting within their jurisdiction and the scope of their powers.

In *Matter of Zborowski*, 68 N. Y. 88, Folger, J., in the opinion, discusses the meaning of the term "judicial" as distinguished from what may be termed "quasi-judicial." In one sense the term "judicial" is used of such bodies or officers as have the power of adjudication upon the rights of persons and property; in the other class of cases as a course of official action for the consequences of which the official will not be liable, although his act was not well judged.

In *Cunningham v. Bucklin*, 8 Cow. 179 (185), Savage, Ch. J., cites with approval from the opinion of Spencer, J., in *Jenkins v. Waldron*, 11 Johns. 114: "It would, in our opinion, be opposed to all the principles of law, justice, and sound policy to hold that

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officers called upon to exercise their deliberative judgments are answerable for a mistake in law, either civilly or criminally, when their motives are pure and untainted with fraud or malice."

The principle is well settled that a public officer, who is not a mere volunteer, but compelled to act in a judicial capacity, is not amenable either civilly or criminally for a mistake in law or error of judgment, when his motives are untainted with fraud or malice. *Teall v. Felton*, 1 N. Y. 537, where it was held that a postmaster did not act judicially in assuming to charge letter postage on a newspaper, in consequence of an initial being on the wrapper, so as to protect him in an action for improperly detaining such newspaper, when no fraud or malice was alleged or proved.

It is held in *East River Gas Light Co. v. Donnelly*, 93 N. Y. 557, that a public officer is not responsible in a civil action for a judicial determination, however erroneous, or however malicious the motive which produced it.

So held in an action against an assessor for refusing to give plaintiff, who was a taxable inhabitant, the benefit of the exemption allowed by law, on account of his being a minister of the gospel, or for assessing his property at a higher rate than that which he had assessed the property of the other inhabitants, though the conduct of the defendant was alleged to have been willful and corrupt. *Weaver v. Devendorf*, 3 Den. 117.

An officer, who is enjoined by law to do certain things, if in his judgment or opinion the requisites therein mentioned have been complied with; and inhibited under the like exercise of his discretion from doing other things, is not answerable to a party who may conceive himself aggrieved from a mistake arising through omission or mere want of skill, if there be no bad faith, corruption, or some misbehavior, or abuse of power. *Seeman v. Patten*, 2 Cai. 311 (317).

A good deal of obscurity has rested upon the subject of the immunity of ministerial officers who perform duties at times which are judicial in their nature, while others purely ministerial are executed by them, and these duties sometimes so mingle as not to be easily distinguished from each other. It is said in *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 463 (466), citing *Wilson v. Mayor of New York*, 1 Den. 599: "Wherever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt

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from all responsibility by action, for the motives which influence him, and the manner in which such duties are performed. If corrupt, he may be impeached or indicted; but he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done. But this judicial immunity can be extended no farther. The civil remedy depends exclusively upon the nature of the duty which has been violated. When duties which are purely ministerial are cast upon officers whose chief functions are judicial, and the ministerial duty is violated, the officer, although for most purposes a judge, is still civilly responsible for such misconduct."

It was said in *Gleason v. Peerless Mfg. Co.*, 1 App. Div. 257, 37 N. Y. Supp. 267, affirmed on opinion below, 163 N. Y. 574, that the common council of a city in determining who was the lowest bidder for a contract acted judicially, but that in this class of cases the term "judicial" is not to be used in the sense of appertaining to the "judiciary" or administration of justice, but as indicating the exercise of discretion or judgment as distinguished from what is purely ministerial. That is to say, the common council in that respect acted in a quasi-judicial capacity, and its action was, therefore, subject to review by the courts.

In *Erving v. Mayor, Aldermen, etc., of New York*, 131 N. Y. 133, it was held that the letting of a contract by the commissioner of public works is judicial in its nature and character, and the award is the result of a judicial act.

Assessors having jurisdiction both of the person taxed and of the subject-matter, are not individually liable for an erroneous assessment, where they act in good faith. To establish a personal liability it must be made to appear that they acted without jurisdiction. *Williams v. Weaver*, 75 N. Y. 30.

Assessors are subordinate officers, and must act within the authority given them; when they have no power to act at all, either as to person or property, their acts are void, and when their right to act depends upon the existence of some fact, an assessment founded upon an erroneous determination by them as to the existence of such fact is illegal. They cannot acquire jurisdiction by determining that they have it. *National Bank of Chemung v. City of Elmira*, 53 N. Y. 49, cited together with *Matter of New York Catholic Protectory*, 77 N. Y. 342, in *Ætna Ins. Co. v. Mayor*, 153 N. Y. 331 (339); *Dorn v. Backer*, 61 N. Y. 261.

Assessors have no jurisdiction to assess a person for personal

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property, unless he is a resident of the town, and if they do, they make themselves personally liable to the person assessed for the damage they occasioned him, even though they act in good faith. *People v. Supervisors of Chcnango*, 11 N. Y. 563; *Mygatt v. Washburn*, 15 N. Y. 316; *Barhydt v. Shepherd*, 35 N. Y. 238.

School district trustees acting as assessors have limited jurisdiction and are liable as trespassers where they fail to keep within their statutory powers. *Jewell v. Van Steenburgh*, 58 N. Y. 85.

But where assessors have jurisdiction, they cannot be held responsible for error in the exercise of that discretion. *Chegaray v. Jenkins*, 5 N. Y. 376; *Weaver v. Devendorf*, 3 Den. 116; *Harman v. Brotherson*, 1 Den. 537.

The decision of assessors upon the question of residence and their consequent jurisdiction is not conclusive, but is open for review. *Dorn v. Backer*, 61 N. Y. 261.

Assessors in making assessments act judicially and they have the immunity of judicial officers. *Van Deventer v. Long Island City*, 139 N. Y. 133.

This rule is subject to the qualification that they have acquired jurisdiction of the person and subject-matter liable to be taxed. The question of jurisdiction being always open to inquiry when the authority to make an assessment is assailed, but having acquired jurisdiction assessors act in a judicial capacity. *McLean v. Jephson*, 123 N. Y. 142.

Assessors have no jurisdiction of the person of one who does not reside within the district within which their jurisdiction extends. *City of New York v. McLean*, 170 N. Y. 374 (384).

There is a clear distinction between a case of erroneous assessment and assessment of property which the law has made no provision for assessing. It is the same in effect as that of an erroneous judgment of a court having jurisdiction of the person and the subject-matter, and the judgment of a court having no jurisdiction. *Norris v. Jones*, 81 Hun, 304 (310), 27 N. Y. Supp. 209, 30 N. Y. Supp. 1134.

Inspectors of election are simply ministerial officers. A board of inspection has no discretionary power to reject the vote of a person who, upon being challenged and on application of the statutory test, has shown himself qualified to vote. *People ex rel. Stapleton v. Bell*, 119 N. Y. 175, citing at p. 186 from *People ex rel. v. Pease*, 27 N. Y. 45, the language of Judge Selden that inspectors "are required to act upon the evidence which the statute



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prescribes, and have no judicial power to pass upon the question of its truth or falsehood."

In *Goetchens v. Mathewson*, 61 N. Y. 420 (437), Dwight, C., distinguishes *Jenkins v. Waldron*, 11 Johns. 914, holding that the question before the inspectors in that case was a point in the law of evidence on which they might be held to act judicially, and arriving at the conclusion that the inspectors in the case then at bar did not act in a judicial capacity.

The immunity of highway commissioners acting in a quasi-judicial capacity is considered in *Beardslee v. Dolge*, 143 N. Y. 160, where the rule is reiterated that the official determination of an officer as to a fact upon which his power to act depends is not conclusive, and if the fact does not exist, his decision that it does exist does not establish jurisdiction.

As to when a court is authorized to entertain jurisdiction, see *O'Donoghue v. Boies*, 159 N. Y. 87 (98).

It is said in *Spalding v. Vilas*, 161 U. S. 483, that "The same general consideration of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of executive departments when engaged in the discharge of duties imposed upon them by law."

It is said in note to Webb's *Pollock Torts*, 145, that military and naval officers, arbitrators, tax assessors, grand and petit jurors, collectors of customs, and school commissioners are called upon to exercise a sort of conventional jurisdiction analogous to that of inferior courts of justice, which are termed "quasi-judicial acts."

## ARTICLE IV.

## PUBLIC OFFICERS.

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## SUBDIVISION 1.

## Nature and Extent of Liability.

A ministerial officer is not liable for doing an act which is either directed or authorized by a valid statute, if performed with

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due care and skill. 23 Am. & Eng. Encyc. of Law, 377, citing *Atwater v. Trustees of Canandaigua*, 124 N. Y. 602 (608), which hold this rule on the authority of *Transportation Co. v. Chicago*, 99 U. S. 635; *Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98, and other authorities, distinguishing *St. Peter v. Denison*, 58 N. Y. 416. Same rule, *Garrott v. Trustees of Canandaigua*, 135 N. Y. 436.

But a ministerial officer is, however, answerable for nonfeasance, misfeasance, or malfeasance. 23 Am. & Eng. Encyc. of Law, 377. He is not liable, however, for damages for nonfeasance, except upon proof showing an omission to perform a plain duty. *Fitzpatrick v. Slocum*, 89 N. Y. 358. A neglect of duty must be shown. *Wooley v. Baldwin*, 101 N. Y. 688. Lack of funds is a valid excuse. *Clapper v. Town of Waterford*, 131 N. Y. 382 (388), and cases cited. For neglect of duty imposed upon a board the members are not individually liable. The neglect is that of the corporate body. *Bassett v. Fish*, 75 N. Y. 303.

It is settled law that the public officer who acts maliciously toward another, or who, in the abuse of his office, and in violation of his duty, omits to act, or acts negligently, or proceeds without, or in excess of authority, is answerable for damages to any one he has specially injured thereby. *Shearman & Redfield*, § 313.

If the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance must be a public, not an individual, injury and must be redressed in some form of public prosecution; if, on the other hand, the duty, is a duty to the individual, then a neglect to perform it or perform it properly is an individual wrong, and may support an individual action for damages. *Cooley*, 379, citing *Butler v. Kent*, 19 Johns. 223.

A public officer while fully discharging the duties of his office is exempt from both civil and criminal liability, but if he steps outside of his duties, assumes a jurisdiction where the law gives him none, or acts negligently or contrary to the statute, he must answer for his conduct. *Bishop*, §§ 771, 773, citing *Kemp v. Neville*, 10 C. B. (N. S.) 523; *Hicks v. Dorn*, 42 N. Y. 47. The latter case holds that a ministerial officer is bound to discharge his duties in a prudent, careful manner, without infringing upon the rights of private individuals, or unnecessarily injuring them, and for an improper discharge of his duty the law makes him liable to the individual injured. Citing *Rochester White Lead Co.*

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v. *City of Rochester*, 3 N. Y. 463; *Robertson v. Chamberlain*, 34 N. Y. 389; *Barton v. City of Syracuse*, 36 N. Y. 54.

A public officer is under constant obligation to discharge the duties of his office with reasonable skill and care, and if he fails in these, and damage ensues to one specially interested in the discharge of such duties, he becomes liable for such damage. *Olmsted v. Dennis*, 77 N. Y. 378. See also *Clark v. Miller*, 54 N. Y. 528.

Public officers, whose duties are not judicial, are answerable to any one specially injured by their careless or negligent performance of their duties as such. *Adsit v. Brady*, 4 Hill, 630. An individual who sustains an injury because of the misfeasance or nonfeasance of a public officer has a cause of action against such officer. *Bryant v. Town of Randolph*, 133 N. Y. 70.

One who, by contract with the State, assumes the duties and is invested with the powers of a public officer, is liable to the individual who sustained special damage by a neglect properly to perform such duties.

A public officer is liable for negligence or malfeasance to any one sustaining damage in consequence thereof. This is based on the broad principle of public policy essential to the public welfare: the law presumes that the office is created for the benefit of the public. *Robinson v. Chamberlain*, 34 N. Y. 389.

This rule is also true of one who assumes the duty and is invested with the powers of a public officer, and a recovery may be had where the assumption of official duty is alleged, together with the possession of official powers by the individual named, his failure to properly perform those duties and a resultant injury to the plaintiff caused by such negligence. *Bennett v. Whitney*, 94 N. Y. 302, citing *Hover v. Barkhoof*, 44 N. Y. 113, where it was held that the principle must be regarded as settled in this State that public officers whose duties are not judicial are answerable in damages to any one specially injured by their careless or negligent performance of or omission to perform the duties of their office.

In *Clark v. Miller*, 54 N. Y. 528, it was held that a ministerial officer charged by statute with an absolute and certain duty, in the performance of which an individual has a special interest, is liable to an action if he refuses to perform it, and he is not relieved from the consequences of his disobedience because it is

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prompted by an honest belief on his part that the statute is unconstitutional.

These and other authorities are cited, commented upon, and followed in *Beardslee v. Dolge*, 143 N. Y. 156 (165); *Wright v. Shanahan*, 149 N. Y. 495 (502).

But ministerial officers can only be made liable to an individual for damages caused by the alleged nonfeasance upon proof showing an omission on their part to perform a plain duty devolved upon them by law. *Fitzpatrick v. Slocum*, 89 N. Y. 358.

When duties which are purely ministerial are cast upon officers whose chief functions are judicial, and the ministerial duty is violated, the officer, although for most purposes a judge, is still civilly responsible for such misconduct. *Wilson v. Mayor of New York*, 1 Den. 595.

A justice of the peace acts ministerially in making a return on appeal and is liable for damages for a false return. *Millard v. Jenkins*, 9 Wend. 298; *McDonnell v. Buffum*, 31 How. Pr. 154; *Brooks v. St. John*, 25 Hun, 540.

Where an individual is sued in tort for some act injurious to another in regard to person or property, he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense, he must show that his authority was sufficient in law to protect him. *Cunningham v. Macon & Brunswick R. R. Co.*, 109 U. S. 446 (452).

In *Walsh v. Trustees of New York & Brooklyn Bridge*, 96 N. Y. 427, it was held that the trustees of the bridge were agents of the States, and as such could not be held personally responsible for negligence.

In *Walsh v. Mayor, etc.*, 107 N. Y. 220, it is held that the cities of New York and Brooklyn, for whom the trustees are agents, are liable for the negligent act of the trustees or persons employed by them.

In no event will an action lie at the suit of the individual against an officer for misbehavior in his office, either from misfeasance or nonfeasance, unless the plaintiff can show a special damage peculiar to himself. *Butler v. Kent*, 19 Johns. 223; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44 (62); *Adler v. Metropolitan R. R. Co.*, 138 N. Y. 173 (180).

Persons acting as agents of the government in the performance

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of their duties are said not to be liable for neglect or misfeasance unless the liability is especially imposed by statute. *Alamango v. Supervisors of Albany County*, 25 Hun, 551, cited with approval, and collating other authorities, *Hughes v. County of Monroe*, 79 Hun, 120, 29 N. Y. Supp. 495.

This rule is placed upon the ground that such agencies, while engaged in that duty, stand so far in the place of the State and exercise its political authority, and do not act in any private capacity. *Alamango v. Supervisors of Albany County*, 25 Hun, 551.

It is held in *Wright v. Shanahan*, 149 N. Y. 495, that the negligent omission of a public officer to perform a ministerial duty or a proper discharge thereof renders him liable to be enjoined, and to respond in damages to the injured party. Citing numerous authorities.

Public officers charged with quasi-public trusts, in the discharge of which private persons are interested, are not answerable for the misconduct of their predecessors. *Vose v. Reed*, 54 N. Y. 657.

The liability of a sheriff for execution of process, etc., is fixed by section 102 of the Code, which provides that a mandate must be executed according to its command, and return made thereof. And that, for a violation of the provision, the sheriff or other officer, to whom the mandate is directed, is liable to the party aggrieved for the damages sustained by him in addition to any fine or other punishment authorized by law.

The authorities upon this point are numerous and are collated in the Annotated Codes under the appropriate section.

In justifying, under proceedings of tribunals of special, limited, and inferior jurisdiction, the material facts necessary to give jurisdiction must be alleged and proved. *Walker v. Moseley*, 5 Den. 102.

**SUBDIVISION 2.****Liability for Acts of Subordinates.**

If a public officer authorized the doing of an act not within the scope of his authority, or he is guilty of negligence in the discharge of duties to be performed by himself, he will be held responsible, but not for the misconduct or malfeasance of such persons as he is obliged to employ. *Bailey v. Mayor of New York*, 3 Hill, 531, 538, per Nelson, Ch. J.

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The general rule is firmly established that public officers and agents are not responsible for the misfeasance or positive wrongs, or for the nonfeasance or negligence or omission of duty of the subagents or servants, or other persons properly employed by and under them in the discharge of their official duties. A public officer is not responsible for the acts or defaults of subordinates, if the subordinates are public officers, even though they be selected by him and subject to his orders. *Murphey v. Commissioners*, 28 N. Y. 134, citing Story on Agency, § 319.

In *Wiggins v. Hathaway*, 6 Barb. 632, it was held that a postmaster is not liable for the malfeasance or embezzlement of his clerks or deputies, and that the opinion is that a postmaster is not liable even for their negligence upon the ground that he is a public officer or agent of the government, and is allowed and required to appoint subagents, who become, by such appointment, also agents of the government.

In *Donovan v. McAlpin*, 85 N. Y. 185, the general principle is laid down that one acting gratuitously as a public officer is not liable for the negligence of the person necessarily employed in the execution of the order properly given by him. The doctrine of *respondeat superior* does not apply.

The responsibility of sheriffs for the acts of their deputies constitutes an exception to this rule. 19 Am. & Eng. Encyc. of Law (1st ed.), 495, citing 1 Bl. Comm. 344; Bacon's Abridgment, Sheriffs.

Upon this point it is said in *McIntyre v. Trumbull*, 7 Johns. 35, that the law is too well settled to be questioned that the sheriff is civilly answerable for the acts of his deputies.

**SUBDIVISION 3.****To What Extent Protected by Process.**

If the court issues to its proper officer its command in due form, where the court has jurisdiction of the case and the process is valid on its face, the officer is justified in executing it however inprovidently it was issued. Bishop, § 792.

Cooley, 538, defines process "fair on its face," as one which proceeds from a court, magistrate or body having authority of law to issue process of that nature, and which is legal in form and on its face contains nothing to notify or fairly apprise the officer that it is issued without authority.

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Ministerial officers are only responsible as trespassers when they act under the authority of a person which has no jurisdiction in the case, or when they execute that authority irregularly. It would be against the obvious principle of justice and policy to make ministerial officers act in such a case at their peril when they have no right to judge and are required to act. *Beach v. Furman*, 9 Johns. 229.

In the leading case of *Savacool v. Boughton*, 5 Wend. 171 (180), the conclusion arrived at by the court, as expressed in the opinion of Marcy, J., is as follows: "The following propositions, I am disposed to believe, will be found to be well sustained by reason and authority:

"That where an inferior court has not jurisdiction of the subject-matter, or having it, has not jurisdiction of the person of the defendants, all its proceedings are absolutely void; neither the members of the court, nor the plaintiff (if he procured or assented to the proceedings), can derive any protection from them when prosecuted by a party aggrieved thereby.

"If a mere ministerial officer executes any process, upon the face of which it appears that the court which issued it had not jurisdiction of the subject-matter or of the person against whom it is directed, such process will afford him no protection for acts done under it.

"If the subject-matter of a suit is within the jurisdiction of a court, but there is a want of jurisdiction as to the person or place, the officer who executes process issued in such suit is no trespasser, unless the want of jurisdiction appears by such process."

In *Sheldon v. Van Buskirk*, 2 N. Y. 473, *Savacool v. Boughton* is cited to the proposition that the ministerial officer is protected in the execution of process, regular on its face and coming from a court or body of men having jurisdiction of the subject-matter.

In *Chegaray v. Jenkins*, 5 N. Y. 376, it is held that a warrant in due form directing the collection of a tax protects the officer executing it, whether the tax was lawfully assessed or not.

*Bradley v. Ward*, 58 N. Y. 401, citing *Savacool v. Boughton*, holds that if the subject-matter is within the jurisdiction of a tribunal of subordinate jurisdiction, the officer who executes process issued is protected unless the want of jurisdiction appears by the process. So held with reference to a warrant and copy of assessment-roll delivered to a town collector.

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*Woolsey v. Morris*, 96 N. Y. 311, opinion per Andrews, J., reiterates the rule as follows: "A ministerial officer is protected in the execution of process regular on its face, issued by a court, officer, or body having general jurisdiction of the subject-matter, or jurisdiction to issue it under special circumstances, although in fact jurisdiction of the person or subject-matter did not exist in the particular case. The rule is founded in public policy for the protection of public officers charged with the duty of executing process, who generally cannot know, or have not the means of ascertaining, whether the court, body, or officer issuing the process had acquired jurisdiction to render the judgment or to institute the proceeding upon which the process is founded."

The general principle is, per Vann, J., in *Müller v. City of Amsterdam*, 149 N. Y. 288, "That the proceedings of magistrates and officers having special and limited jurisdiction must bear on their face the evidence of their jurisdiction, or they will be judged invalid, and that in collateral actions their judgments may be questioned and disregarded if it appears that in fact they had no authority to act in the given case."

A public officer justifying under a warrant, regular on its face and in its recital and commands *prima facie* authorized and legal, is protected. *Troy & Lansingburgh R. R. Co. v. Kane*, 72 N. Y. 614, citing *Hudler v. Golden*, 36 N. Y. 446. This and other authorities are cited in *Arrex v. Brodhead*, 19 Hun, 269 (270).

And a ministerial officer is protected in the execution of process regular on its face though he has knowledge of facts rendering it void for want of jurisdiction. *People v. Warren*, 5 Hill, 440, cited and followed in *Bulymore v. Cooper*, 46 N. Y. 236 (243).

In *Woolsey v. Morris*, 96 N. Y. 311 (316), it is said that a ministerial officer, citing *Webber v. Gay*, 24 Wend. 486, is not bound to inquire as to the legality of the assessment which it is his duty to collect.

Where the property of a citizen is seized under and pursuant to process under an unconstitutional statute and void, the officer is liable as a trespasser, where the process on its face recites the authority upon which it was issued and so discloses that the officer issuing it had no jurisdiction. This is no protection to the officer issuing it, and he is liable as a trespasser. *United Lines Telegraph Co. v. Grant*, 137 N. Y. 7, citing among other cases *Hallock*



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v. *Dominy*, 69 N. Y. 239; *Van Rensselaer v. Whitbeck*, 7 N. Y. 517.

Where the subject-matter is not within the jurisdiction of a court, all the proceedings are void, and the officer executing them, as well as the party, is a trespasser. *Smith v. Shaw*, 12 Johns. 257.

But where process is void the party who sets it in motion, and all persons aiding and assisting him, are *prima facie* trespassers, and acts which an officer might justify under a process actually void, but regular and apparently valid on its face, will be trespasses as against the party. *Kerr v. Mount*, 28 N. Y. 659.

In *Roderigas v. East River Savings Institution*, 76 N. Y. 316 (323), it is said, per Church, Ch. J., in speaking of the rule of protection to ministerial officers as laid down in *Savacool v. Boughton*, *supra*, that "it applies to ministerial officers who, having process apparently regular, are bound to act, and are hence protected and active. The rule goes no farther. It does not protect the party nor a purchaser under such a process, however innocent he may be."

The officer does not lose the right to be protected under his process because he has been indemnified by a person under whose process he acted. *Horton v. Hendershot*, 1 Hill, 118.

An officer, acting under process apparently valid but actually void, may avail himself thereof for defense but not for aggression.

Where, therefore, an officer, who, by virtue of a process valid upon its face but void for want of jurisdiction in the court issuing it, has levied upon and taken possession of property, brings an action to recover the property against another officer, who, by virtue of process against the owner, apparently valid, has taken it from plaintiff's possession, the character of such possession, is a subject of inquiry and attack, and the invalidity of the process under which plaintiff acted may be shown; but defendant's process protects him and its validity cannot be assailed. Plaintiff's process, however, and his possession under it, establish, *prima facie*, a right of action. *Clearwater v. Brill*, 63 N. Y. 627.

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**ARTICLE V.****ACTS OF NECESSITY AND INEVITABLE ACCIDENT.**

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**SUBDIVISION 1.****Acts of Necessity.**

Necessity is that which makes the contrary of a thing impossible. Whatever is done through necessity is done without any intention, and as the act is done without will and is compulsory the agent is not responsible. Bacon's Maxims; Comyn's Dig.

One must be protected from the necessary consequences, however harmful, of discharging a duty which one is expected to perform. One may enter his neighbor's premises to rescue his beast from the mire, and much more to save human life. Bigelow on Torts, § 20.

If a ferryman overload his boat with merchandise a passenger may, in case of necessity, throw overboard the goods to save his own life, and that of his fellow passengers. *Mouse's Case*, 12 Rep. 63.

The rights of necessity are a part of the law. The common law adopts the principle of the natural law, and finds the right and the justification in the same imperative necessity. *Respublica v. Sparhawk*, 1 Dall. 357, 362.

This principle is recognized in *Eckert v. Long Island R. R. Co.*, 43 N. Y. 502, which held that the law has so high a regard for human life that it will not impute negligence to the effort to preserve it unless made under circumstances constituting rashness. But this rule does not apply where a person voluntarily places himself in danger for the protection of property merely.

"The best elementary writers lay down the principle, and adjudications upon adjudications have for centuries sustained, sanctioned, and upheld it, that in a case of actual necessity, to prevent the spreading of a fire, the ravages of a pestilence, or any other great public calamity, the private property of any individual may be lawfully destroyed for the relief, protection, or safety of the many, without subjecting the actors to personal responsibility for

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the damages which the owner has sustained." *Russell v. Mayor of New York*, 2 Den. 461 (474).

This rule is held in *The Mayor of New York v. Lord*, 17 Wend. 285. In case of necessity, to prevent the spreading of a fire, magistrates or individuals may destroy private property without subjecting themselves to an action for damages. This being one of many cases where the maxim applies, *Salus populi suprema lex*.

On appeal, 18 Wend. 125 (129), the chancellor says: "The principle appears to be well settled, that in a case of actual necessity, to prevent the spreading of a fire, the ravages of a pestilence, the advance of a hostile army, or any other great public calamity, the private property of an individual may be lawfully taken and used or destroyed, for the relief, protection, or safety of the many, without subjecting those whose duty it is to protect the public interests, by whom, or under whose direction such private property was taken or destroyed, to personal liability for the damage which the owner has thereby sustained."

The rule is also offered to excuse a trespass when a highway is so obstructed as to be impassable. *Taylor v. Whitehead*, Douglas, 749. But an encroachment upon a street for business purposes is not justifiable. *People v. Cunningham*, 1 Den. 524.

"The property or rights of individuals may be justly sacrificed to the necessities of others, where neither the State, as a whole, nor the public, in the general sense of that term, have any interest in such a sacrifice. This may be seen in cases of imminent peril, when the right of self-defense, of life or property, authorizes the sacrifice of other and less valuable property. The throwing overboard of goods in a storm, the pulling down of houses to prevent the spreading of a conflagration, are common examples of the exercise of this right. This is a natural right, arising from inevitable and pressing necessity, when of two immediate evils, one must be chosen, and the less is voluntarily inflicted in order to avoid the greater. Under such circumstances, the general and natural law of all civilized nations, recognized and ratified by the express decisions of our common law, authorizes the destruction of property by any citizen, without his being subject to any right of recovery against him by the owner. The agent in such destruction, whether in protection of his own rights or of those of others which may be accidentally under his safeguard, acts from

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good motives and for a justifiable end; so that against him the sufferer has no rightful claim." *Stone v. The Mayor and Aldermen*, 25 Wend. 157, cited, together with *Russell v. Mayor*, 2 Den. 461, in *People ex rel. Brisbane v. Common Council*, 76 N. Y. 562.

## SUBDIVISION 2.

## Inevitable Accident.

An unexpected injury caused by operation of nature or by a person without intention or negligence, is an accident. Pollock on Torts, 164. An occurrence which could not have been avoided by any degree of care capable of being exercised under the circumstances is an accident. Standard Dictionary, 14. An accident is an event which happens unexpectedly and without fault, Cooley on Torts, 20. If the injury is caused purely by inevitable or unavoidable accident, while engaged in a lawful business, there is no legal liability. Shearman & Redfield on Negligence, § 53.

The general principle of our law is that loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune. But anything is an accident which one could not fairly have been expected to contemplate as possible and, therefore, avoid. Holmes on the Common Law, 94.

"An accident is the happening of an event without the aid and the design of the person, and which is unforeseen." *Paul v. Travelers' Ins. Co.*, 112 N. Y. 478.

The terms "act of God" and "inevitable accident" have created a considerable amount of confusion in the law. Wright, J., in *Merritt v. Earle*, 29 N. Y. 117, says, that while these terms have been sometimes used in a similar sense and in equivalent terms, there is a distinction. That may be an inevitable accident which no foresight or precaution of man could prevent, but the phrase "act of God" denotes natural accidents that could not happen by the intervention of man. The expression excludes all human agency.

Again in *Michaels v. N. Y. C. & H. R. R. R. Co.*, 30 N. Y. 564, the same justice says that in order to constitute an act of God there can be no co-operation of man or any admixture of human means.

In *Bullock v. Babcock*, 3 Wend. 391, Marcy, J., says that if

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an accident happened entirely without the fault of the defendant, or any blame being imputable to him, the action will not lie.

In *Harvey v. Dunlop*, Lalor's Supp. to Hill & Denio, 193, Nelson, Ch. J., says: "All the cases concede that an injury arising from some inevitable accident, or, which in law or reason is the same thing, from an action that ordinary human care and foresight are unable to guard against, is but the misfortune of the sufferer, and lays no foundation for legal responsibility."

The leading case as to the application of the rule of inevitable accident is the *Nitro-Glycerine Case*, 15 Wall. 524. It was held that the consequence of an inevitable accident must be borne by the sufferer as his misfortune, a doctrine which is said to be recognized and affirmed in many cases. That the rule deducible from the cases is that the measure of care against accident which one must take to avoid responsibility is that which one of ordinary prudence and caution must use if his own interests were to be affected and the entire risk his own. Field, J., says, quoting the language of Justice Nelson, in *Harvey v. Dunlop*, Lalor's Supplement, 193: "No case or principle can be found, or if found can be maintained, subjecting an individual to liability for an act done without fault on his part."

In *Cleveland v. New Jersey Steamboat Co.*, 125 N. Y. 299, cited in *Hollenbeck v. Johnson*, 79 Hun, 499-506, 29 N. Y. Supp. 945, it was held that the plaintiff could not recover because the accident resulted from causes which no human being up to that time could reasonably expect to occur, and was the result of causes for the existence of which no one was legally responsible. Same rule, *Dougan v. Champlain Transportation Co.*, 56 N. Y. 1.

Exception from liability upon the ground of inevitable accident is closely allied with the rule that one is exempt from liability when in the exercise of common-law or statutory rights, as in *Cosulich v. Standard Oil Co.*, 122 N. Y. 118, where it was held that the law does not impose upon one carrying on a lawful business upon his own lands the obligation of saving others from the consequence of inevitable accident. And the same principle is applied in *Losee v. Buchanan*, 51 N. Y. 476, where it was said that one holds his property subject to the risks that it may accidentally be injured by others, and that one must take the risk of being accidentally injured when it is without fault upon the part of another. The question involved is usually as to whether

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the accident was inevitable, and is frequently considered in connection with the application of the maxim *res ipsa loquitur*, which is held to apply where carelessness or willfulness would have produced the accident. *Piehl v. Albany Ry. Co.*, 30 App. Div. 166, 51 N. Y. Supp. 755, affirmed in 162 N. Y. 617.

Common carriers are excused from carrying out their contracts for the carriage of goods by act of God, but *not* so by inevitable accident, although Johnson, J., goes so far as to hold that the accident causing the delay out of which that action arose was not an "inevitable accident." *Merritt v. Earle*, 29 N. Y. 115. See "Assault and Battery," subdivision "Accident."

## ARTICLE VI.

### EXERCISE OF COMMON LAW AND STATUTORY RIGHTS.

The exercise of ordinary rights for a legal purpose and in a lawful manner is no wrong, even if it causes damage. Pollock on Torts, 175, citing case from Year-Book of Henry IV.

If a man be injured by the lawful exercise of another's ordinary right he has no action, and it is immaterial whether the exercise of such rights is prompted by a malicious motive. Fraser, 21.

This principle is stated in Bishop on Non-Contract Law, § 109. He says: "Subject to the duty of abstaining from avoidable injury to others, it is every man's right to manage his own volitions, interests, and property as he will without liability to one casually harmed thereby. When the facts of a case permit a choice, he must adopt the course which will not impair another's rights to the exclusion of one which will. But no person may so exercise a right as to injure another's legally recognized right, if there is a way practically open to him whereby he can avoid it, and at the same time make his own right effectual."

Harm necessarily caused by the exercise of one's ordinary rights will not support an action. Hale on Torts, 55, citing *Mogul Steamship Co. v. McGregor*, 23 Q. B. 598; *Respublica v. Sparhawk*, 1 Dall. 357 (362); *Mouse's Case*, 12 Coke, 63; *Maleverer v. Spinke*, 1 Dyer, 36b; *Brown v. Howard*, 14 Johns. 119. *Mogul Steamship Co. v. McGregor*, 23 Q. B. 598, affirmed in H. of L. (1892), A. C. 25, holds that for one person to undersell another is not a wrong, though the seller may purposely dispose

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of the article at unremunerative prices for the purpose of attracting custom for other articles; and still further, that it is not a wrong to offer advantages to a customer to deal with the party offering the advantage, to the exclusion of rivals.

Bowen, L. J., in *Mogul Steamship Co. Case*, lays down clearly and forcibly the rule with regard to the power of a citizen to exercise his common rights. He says: "If a man be injured by the exercise of another's ordinary rights, he has no action. This immunity in the exercise of common rights is a restatement, in a somewhat different form, of the doctrine embodied in the "*damnum absque injuria*." The right to transact business is a universal one. Damages consequent upon competition are not actionable. "To attempt to limit \* \* \* competition \* \* \* would probably be as hopeless an endeavor as the experiment of King Canute."

This question is very fully considered in *Losee v. Buchanan*, 51 N. Y. 476, upon discussion of the authorities in this country and England, questioning *Fletcher v. Rylands* (L. R., 1 Exch. 265) and holding a different rule. Earl, C., in the opinion (at p. 484), uses the following language: "We must have factories, machinery, dams, canals, and railroads. They are demanded by the manifold wants of mankind, and lay at the basis of all our civilization. If I have any of these upon my lands, and they are not a nuisance and are not so managed as to become such, I am not responsible for any damage they accidentally and unavoidably do my neighbor. He receives his compensation for such damage by the general good, in which he shares, and the right which he has to place the same things upon his lands. I may not place or keep a nuisance upon my land to the damage of my neighbor, and I have my compensation for the surrender of this right to use my own, as I will by the similar restrictions imposed upon my neighbor for my benefit. I hold my property subject to the risk that it may be unavoidably or accidentally injured by those who live near me; and as I move about upon the public highways and in all places where other persons may lawfully be, I take the risk of being accidentally injured in my person by them without fault on their part. \* Most of the rights of property, as well as of persons, in the social state, are not absolute but relative, and they must be so arranged and modified, not unnecessarily infringing upon natural rights, as upon the whole to promote the general welfare."

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In *Seaman v. Mayor*, 80 N. Y. 239, it is said that no person can be made liable for damages caused by a lawful structure without some fault.

In *Bohan v. Port Jervis Gas Light Co.*, 122 N. Y. 18, it is said: "The principle that one cannot recover for injuries sustained from lawful acts done on one's own property without negligence and without malice, is well founded in the law. Every one has the right to the reasonable enjoyment of his own property, and so long as the use to which he devotes it violates no rights of others, there is no legal cause of action against him."

And in *Cosulich v. Standard Oil Co.*, 122 N. Y. 118, it is held that the law does not impose upon one conducting a lawful business upon his own lands the obligation of saving others harmless from the consequences of inevitable accidents; the limit of his duty, where no contract relations exist, is the exercise of reasonable care and caution to save others from injury."

*Benner v. Atlantic Dredging Co.*, 134 N. Y. 156, is authority for the proposition that where a contractor is doing in an appropriate manner public work required by contract with the government, and exercises due care in the execution thereof, and injuries result to private property, he is not liable therefor.

An action will not lie against an owner of lands who, in digging a well upon his own premises, intercepts an underground current of water and prevents it reaching the springs or open running stream on the soil of another. *Trustees of the Village of Delhi v. Youmans*, 45 N. Y. 362; *Bloodgood v. Ayers*, 108 N. Y. 400. But see *Van Wycklen v. City of Brooklyn*, 118 N. Y. 424; *Forbell v. City of New York*, 164 N. Y. 522.

So darkening another's windows or depriving him of a prospect by building on one's own land invades no legal right. So as to digging by a person upon his own soil so as to endanger the foundation of the building of the adjoining owner, and numerous similar acts by an owner of the land, impairing the enjoyment and value of the land of another. *Pickard v. Collins*, 23 Barb. 444 (458).

"A man may do many things under a lawful authority, or on his own land, which may result in an injury to the property of others, without being answerable for the consequences. Indeed, an act done under lawful authority, if done in a proper manner, can never subject the party to an action, whatever consequences



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 Art. 6. Exercise of Common Law and Statutory Rights.
 

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may follow. Nor will a man be answerable for the consequences of enjoying his own property in the way such property is usually enjoyed, unless an injury has resulted to another from the want of proper care or skill on his part." *Radcliff's Executors v. The Mayor, etc., of Brooklyn*, 4 N. Y. 195 (200).

This rule is illustrated in *Partridge v. Gilbert*, 15 N. Y. 601 (612); *Brooks v. Curtis*, 50 N. Y. 639; *Clark v. Foot*, 8 Johns. 421; *Farrand v. Marshall*, 21 Barb. 409; *Austin v. Hudson River R. R. Co.*, 25 N. Y. 346; *Stewart v. Hawley*, 22 Barb. 619; *Ellis v. Duncan*, 21 Barb. 230; *Bliss v. Greeley*, 45 N. Y. 671; *Ryckman v. Gillis*, 6 Lans. 79; *Sullivan v. Dunham*, 161 N. Y. 290; *Uppington v. City of New York*, 165 N. Y. 222.

It is undoubtedly true that there are cases in which the legislature, in the public interest, may authorize and legalize the doing of acts resulting in consequential injury to private property, without providing compensation, and as to which the legislative sanction may be pleaded in bar of any claim for indemnity. Indeed such is the transcendent power of Parliament that it is the settled doctrine of the English law that no court can treat that as a public or private wrong which Parliament has authorized, and consequently, as stated by Blackburn, J., in *Hammersmith, etc., Ry. Co. v. Brand*, 4 H. of L. Cas. (Eng. & Ir. App.) 171, "The person who has sustained a loss by the doing of that act is without remedy, unless in so far as the legislature has thought it proper to provide for compensation." The legislative power in this country is subject to restrictions, but nevertheless private property is frequently subjected to injuries incurred from the execution of public powers conferred by statute, for which there is no redress. The case of consequential injuries resulting from street improvements authorized by the legislature is a familiar example. *Cogswell v. N. Y. & H. R. R. Co.*, 103 N. Y. 10 (18).

While the legislature may authorize acts which would otherwise be a nuisance, when they affect or relate to matters in which the public have an interest or over which they have control, the statutory authority which affords immunity for such acts must be express, or a clear and unquestionable implication from powers expressly conferred, and it must appear that the legislature contemplated the doing of the very act which occasioned the injury. Even in such case, while the legislative authorization exempts from liability to suits, civil or criminal, at the instance of the State,

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it does not affect the claim of a private citizen for damages for any special inconvenience or discomfort not experienced by the public at large." *Bohan v. Port Jervis Gas Light Co.*, 122 N. Y. 18.

While legal liability in damages cannot result from acts of a municipal corporation, done in the performance of a public duty by express legislative authority, which, as between individuals, would be regarded as a nuisance, and which would result in injury to another, the authority must be express, or a clear and unquestionable implication from powers conferred, and must be certain and unambiguous, showing that the legislature must have intended and contemplated the very act in question. *Morton v. Mayor, Aldermen and Commonalty of the City of New York*, 140 N. Y. 207.

These cases are cited with approval in *Fries v. N. Y. & H. R. R. Co.*, 169 N. Y. 270, opinion O'Brien, J., 277.

The legal effect of compliance with a legislative act by a municipal corporation resulting in injury to property is considered in *Lewis v. N. Y. & H. R. R. Co.*, 162 N. Y. 202; *Fries v. N. Y. & H. R. R. Co.*, 169 N. Y. 270; *Muhlker v. N. Y. & H. R. R. Co.*, 173 N. Y. 549, the latter case discussing and distinguishing the two previous decisions, holding the rule to be that, where an act is performed in accordance with the direct and express mandate of the statute and there is no encroachment upon or actual interference with property, and an improvement is made for the benefit of the public in a proper manner, no recovery can be had against a municipal corporation in absence of negligence or want of skill. It was held to be one of the cases where the individual must be subjected to remote or consequential damage or loss following the rule laid down in *Fries Case*, 169 N. Y. 270, recognizing as correct, however, the rule laid down in the *Reining Case*, 128 N. Y. 157, that a municipality cannot raise the grade of a street for the exclusive use of a railroad without compensating the abutter for the injury inflicted, distinguishing it from the case then at bar upon the ground that in the latter case the change was made for the public benefit as well as for that of the railroad. See *Dolan v. N. Y. & H. R. R. Co.*, 175 N. Y. 367.

In an action to recover damages for injuries to the vault of a building, constructed under a sidewalk, alleged to have been caused by the negligence of defendant in blasting while engaged

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 Art. 7. Consent as Affecting Right of Action.
 

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in excavating a trench in the street in front of the building under a municipal contract providing that the blasting should be conducted in conformity with the city ordinances, where there is no evidence showing or tending to show negligence in the performance of the work, and for aught that appears the injuries may have been a natural result thereof, influenced possibly in addition by some weakness in the construction of the building, a nonsuit is properly granted. *Holland House Co. v. Baird*, 169 N. Y. 136. See also *Bates v. Holbrook*, 171 N. Y. 460.

### ARTICLE VII.

#### CONSENT AS AFFECTING RIGHT OF ACTION.

A sufferer is not entitled to bring action where there is lief and license. No action is maintainable for damage for acts suffered by consent, if such acts were not likely or intended to cause bodily harm. *Fraser*, 23.

As illustrating the rule that a person consenting to injury which he may suffer has no legal redress, Pollock says, at p. 130: "There are incidents in every football match which an uninstructed observer might easily take for a confused fight of savages, and grave hurt sometimes ensues to one or more of the players. Yet, so long as the play is fairly conducted according to the rules agreed upon, there is no wrong and no cause of action. For the players have joined in the game of their own free will and accepted its risks."

The man who consents to an act is barred of an action for it. There is a limit to the validity of consent, and it is said that no very satisfactory ground has been reached upon that subject. It is illustrated by the refusal on the part of most authorities to hold an agreement between the shipper and common carrier, to exempt the carrier from liability for negligence of his servant as valid on the ground that the shipper is in the power of the carrier, and it is also held where both parties agree to a fight, one may sue the other for assault and battery notwithstanding the consent. *Bigelow on Torts*, §§ 18, 19, citing *Shaw v. Thompson*, 59 Wis. 540; *Adams v. Waggoner*, 33 Ind. 531.

Harm suffered by consent is not in general the basis of a civil action. This is the meaning of the maxim, "*volenti non fit injuria*." *Hale on Torts*, 116; *Broom Maxims*, 267; *Bishop on Non-Contract Law*, § 49.

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 Art. 7. Consent as Affecting Right of Action.
 

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One inflicting an injury while engaged in a game or sport is liable for such injury if it was intentional; but if the injury was inflicted in good faith and within the rules of the game, it is not actionable. *Black's Law and Practice in Accident Cases*, § 38.

But a voluntary consent, or consent to a wrong induced by fraud, duress, and conspiracy is no answer to the action upon the wrong by the party consenting against the party procuring the consent. *Johnson v. Girdwood*, 7 Misc. Rep. 651.

In *Commonwealth v. Collberg*, 119 Mass. 353, 20 Am. Rep. 328, it is said: "The common law recognizes as not necessarily unlawful certain manly sports calculated to give bodily strength, skill, and activity, and to fit people for defense, public as well as personal, in time of need. Playing at cudgels or foils, or wrestling by consent, there being no motive to do bodily harm on either side, are said to be exercises of this description. \* \* \* But prize-fighting, boxing matches, and encounters of that kind serve no useful purpose, tend to breaches of the peace, and are unlawful, even when entered into by agreement and without anger or mutual ill-will. If one party licenses another to beat him, such license is void, because it is against the law."

The following authorities hold the same rule: *Smith v. Simon*, 69 Mich. 481, 47 N. E. 548; *Evans v. Waite*, 83 Wis. 286, 53 N. W. 445; *Shay v. Thompson*, 59 Wis. 540, 18 N. W. 473; *Grotton v. Glidden*, 84 Me. 589, 24 Atl. 1008; *Dole v. Erskine*, 35 N. H. 503; *Jones v. Gale*, 22 Mo. App. 637. See, however, *Galbraith v. Fleming*, 60 Mich. 403, 27 N. W. 581; *State v. Olympic Club*, 48 La. Ann. 935, 15 So. 190.

In *Searing v. Village of Saratoga Springs*, 39 Hun, 307, it was held that plaintiff could not recover for injury by discharge of sewerage upon her land, as she had consented to the laying of the pipe. Affirmed, without opinion, in 110 N. Y. 643.

A husband cannot rely upon that as a seduction of his wife, to which he has either expressly or impliedly consented. *Wyndham v. Wycombe*, 4 Esp. 16.

A person seduced cannot maintain an action for such seduction because she consented thereto. An action may be maintained by the parent. *Hamilton v. Lomax*, 26 Barb. 615. See "Assault and Battery," subdivision "Consent."

## CHAPTER VI.

### REMEDIES FOR WRONGS.

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#### ARTICLE I.

##### CIVIL AND CRIMINAL REMEDIES NOT MERGED.

All the definitions of a tort refer to the civil remedy for a wrong and have no reference to its punishment as a crime.

The distinction is fully recognized between criminal actions, as such, prosecuted by the people of the State against a person charged with a public offense, for the punishment thereof in section 3336, Code Civ. Proc., and a civil action for a wrong brought on behalf of the individual injured, as defined by section 3337. This is true, although the same state of facts may constitute a crime for which the offender may be prosecuted at the suit of the public or the State, and a tort for which the injured party may maintain a civil action for damages. 26 Encyc. of Law, "Torts" (1st ed.), 73, citing 4 Bl. Comm. 5; Cooley on Torts (2d ed.), 84.

That the criminal suit is not a bar to the civil, and that no court will drive the prosecutor to elect between them, if the former be by indictment, is entirely settled. *Jones v. Clay*, 1 Bos. & P. 191; *Jacks v. Bell*, 3 Car. & P. 316.

He may proceed by both at the same time; nor will the courts even stay proceedings in the civil action to govern themselves by the event of a pending criminal prosecution. *Caddy v. Barlow*, 1 Man. & R. 275; *Cook v. Ellis*, 6 Hill, 466 (467).

The provision of section 1899 of the Code that "where the violation of a right admits of a civil and also of a criminal prose-

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cution, the one is not merged in the other," is a codification of preceding statutes enacting that persons aggrieved by any felony may maintain an action in like manner as if the act had not been committed feloniously, and in no case shall the right of action be merged in the felony, the purpose being to change the rule prevailing at common law. *People v. Piat*, 19 Misc. Rep. 131 (134), citing *Newton v. Porter*, 5 Lans. 423.

The same rule was held under the Revised Statutes. In *Gordon v. Hostetter*, 37 N. Y. 99 (105), it is said that the civil remedy of a plaintiff is neither merged in an alleged felony, nor suspended until the conviction of the offender.

Where one in perpetration of a public wrong commits an injury upon another peculiar to the injured party in his individual capacity, and not simply as a member of the community, the injured party may sustain an action in his individual capacity for the damages sustained by him. This was always the rule in cases of misdemeanor, but did not at common law extend to felonies, as the private wrong was merged in the felony; but under our statute the right to prosecute one is not merged in the other. *Smith v. Lockwood*, 13 Barb. 209 (217).

A person may be liable civilly, although he has been prosecuted criminally for the same offense. *Van Norden v. Robinson*, 45 Hun, 567 (570); *Kain v. Larkin*, 56 Hun, 79, 9 N. Y. Supp. 89; *Austin v. Carswell*, 67 Hun, 579, 22 N. Y. Supp. 478.

ARTICLE II.

CIVIL REMEDIES FOR WRONGS.

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SUBDIVISION 1.

Self-Defense and Abatement of Nuisance.

In the leading case of *Ashby v. White*, 4 Ld. Raym. 938; 1 Smith's Cases, 473, Lord Holt said: "It is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal." To repel force by force is said to be the right of every person. The force employed must not be out

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of proportion to the apparent urgency of the occasion. Pollock on Torts, 210.

Citing Cooley on Torts, p. 50, for the rule that we are allowed to repel force by force not for the redress of injuries, but for their protection.

The right of self-defense extends to the use of physical force in the protection of property as well as of the person of the defendant, provided the property be at the time in the defendant's possession. Bigelow on Torts (7th ed.), § 381.

The term "self-defense" may be defined to be a species of redress exercised by one person to protect his person or property from injury by another. 21 Encyc. of Law (1st ed.), 1058. In defense of one's person when an assault is made it may be repelled by force sufficient for self-defense, although if the person assaulted uses excessive force, beyond what is necessary for self-defense, he not only deprives himself of the right to maintain an action for the assault, but is liable for the excess. *Elliott v. Brown*, 2 Wend. 497.

Self-defense is a primary law of nature and is held in excuse for breaches of the peace, but care must be taken that the resistance does not exceed the bounds of mere defense, prevention, or recovery, so as to become vindictive. *Scribner v. Beach*, 4 Den. 448.

So one may justify an assault in defense of his land or goods, or of the goods of another delivered to him to be kept, and the resumption of possession of land and houses by force is frequently allowed. *Bliss v. Johnson*, 73 N. Y. 529; *Scribner v. Beach*, 4 Den. 448, citing numerous authorities. Cited in *People v. McGrath*, 47 Hun, 326, together with *Shorter v. People*, 2 N. Y. 193; *People v. Sullivan*, 7 N. Y. 396.

In a few cases a party is allowed to redress his own wrong without an appeal to the law. Where by the act or wrongful neglect of another a nuisance exists to his prejudice, whether it injures him alone or is one that is a nuisance to the public generally, but in some peculiar manner injurious to him, he may of his own volition proceed to abate or remove it. The blocking or encroaching upon a highway is a public nuisance, and the public authorities should be prompt in abating it, but one who has occasion to make use of the way need not await their action, but may himself lawfully remove that in which the nuisance consists. But

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if he seeks compensation for the personal wrong he must resort to suit at law. Cooley Elements of Torts, 16.

A private nuisance may be abated by the party aggrieved who may always resort to this summary method of redress whenever he has been injured to such an extent as to give him a right of action. 1 Am. & Eng. Encyc. of Law (2d ed.), 79.

Any one may abate a common nuisance. *Thompson v. Allen*, 7 Lans. 459, citing 3 Blackst. 5; *Brown v. Bowan*, 30 N. Y. 519; *Adams v. Conover*, 87 id. 422 (428).

In *Pierce v. Dart*, 7 Cow. 609, it is held that abatement of a nuisance is a remedy by the act of a party, but that it does not bar an action for the original invasion of plaintiff's right. While in *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44 (62), it is held that no one has a right to abate a nuisance unless he has himself sustained some damages not sustained by the rest of the community. *Lansing v. Smith*, 8 Cow. 146.

**SUBDIVISION 2.****Action of Replevin.**

Replevin is a remedy for any unlawful taking and detention, or detention alone, of personalty, the same being delivered to the claimant upon security given either to make out the injustice of the detention or to return the property. It is "a form of action which lies to regain possession of personal chattels which have been taken from the plaintiff unlawfully." Bouv. Law Dict. Cited in Fiero on Special Actions, 738.

"Replevin lies whenever the defendant unlawfully detains property from the plaintiff, without regard to the manner of taking, though, at common law, the taking must have been unlawful. In trover, the plaintiff never obtains the possession of the property, but only its alternative value in damages, and the same is true of trespass. While in replevin the plaintiff, by giving bond, obtains possession of the property at the beginning of the action. Replevin, therefore, differs from trover and trespass in that it is for the recovery of the specific property and not for damages. It differs from trespass in that it lies for property wrongfully detained, irrespective of the manner of taking; and it differs from detinue in that it restores the property to the plaintiff at the beginning of the action." 20 Am. & Eng. Encyc. of Law (1st ed.), 1045.



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The action of replevin lies for any wrongful taking or unlawful detention of the goods of another. It belongs to the same class of cases as trespass and trover. *Pangburn v. Partridge*, 7 Johns. 140; *Wheeler v. McFarland*, 10 Wend. 318; *Gardner v. Campbell*, 15 Johns. 401; *Hopkins v. Hopkins*, 10 Johns. 369; *Marshall v. Davis*, 1 Wend. 109; *Holbrook v. Wight*, 24 Wend. 169.

An action to recover a chattel, as regulated by the Code of Civil Procedure, is substantially a substitute for an action of replevin as it previously existed. *Griffin v. L. I. R. R. Co.*, 101 N. Y. 351.

The history of the writ of replevin at common law and under our statutes is reviewed in *Manning v. Keenan*, 73 N. Y. 45.

Replevin is a special action under the Code of Procedure, §§ 1689 to 1736. It is, however, a form of action and not a distinct tort. It relates to procedure rather than to the law of torts. As such it is fully treated in Fiero on Special Actions, 737-835.

## SUBDIVISION 3.

## Equitable Relief.

The authorities clearly indicate that the power of the courts to afford a remedy in actions for wrongs is not confined to the form of actions known to the common law. This is especially true in view of the provisions of the Code by which forms of action are abolished and the complaint is required only to contain "a plain and concise statement of the facts constituting each cause of action." Code, § 481.

"With respect to wrongs independent of contract, the restraining process of equity extends throughout the whole range of property rights and duties recognized by municipal law. Although the jurisdiction of equity is in general so extensive, it is restrained and modified by considerations of convenience, and equity will not interfere where the breach of a duty or the violation of a right may be completely and adequately paid for by damages at law, or where other reasons of justice and convenience are against and in contravention of equity." *Eaton Eq.* 578, citing *Snell Eq.* 492; *Pomeroy on Equity Jurisprudence*, § 1338.

While equity does not concern itself with torts merely for the purpose of awarding compensation, still from an early period the prevention of torts through the interposition of chancery has constituted a not inconsiderable feature of its jurisdiction. \* \* \*

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Injunction is available to prevent the commission of many species of torts, and in this field as well as others it has been constantly extended. \* \* \* Injunction lies to restrain trespass where the remedy in damages would be inadequate; to prevent the commission of waste; to restrain the continuation of nuisances; to protect easements such as those of support, party-walls, the right of way, and the flow of water; and to prevent the infringement of copyrights, patents, and trademarks. 11 Am. & Eng. Encyc. of Law, 192, 193.

Subject to a few exceptions, courts of equity exercise a general jurisdiction to grant relief in cases of fraud, concurrent with the jurisdiction of courts of law. Sometimes their jurisdiction is exclusive. It is a general rule, however, that a court of equity will not assume jurisdiction in a case where there is a plain, adequate, and complete remedy at law, even though fraud is charged as a ground of relief. But to exclude jurisdiction, it is not enough merely to show that there is a remedy at law. The remedy must be plain, adequate, and complete. The remedy at law, to exclude equity jurisdiction in cases of fraud, may be either by an action brought by the person defrauded, or by defense or counterclaim in an action by the other party. 14 Am. & Eng. Encyc. of Law, 172.

The jurisdiction of equity to prevent torts is exercised subject to the general maxim that equity will not interfere where there is a full, adequate, and complete remedy at law. The jurisdiction, nevertheless, is very broad and embraces very many subjects. Most of them will be found under some one of the following heads, namely: "Waste; Trespass; Nuisance; Copyright; Literary Property; Patent Right; Trademarks; Alienation of Property; Protection of Property; Pending Litigation; Negative Covenants, and Corporations." Bispham's Principles of Equity, 554.

Courts of equity have never fixed any definite bounds as regards the wrongs and abuses which they will and will not restrain by injunction. Instances are continually arising where the dilatory proceedings of an action at law do not afford a sufficient remedy. Courts in granting the remedy by injunction against wrongs exercise a sound discretion, and it is not a fatal objection that the purpose for which the particular writ is asked is novel. Spelling on Injunctions, §§ 5, 921, citing Eden on Injunctions, pp. 1, 2. The following cases are there referred to in which injunction will lie—Prevention of Monopoly (see Anti-Trust Statute, N. Y.);

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Art. 2. Civil Remedies for Wrongs.

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Restraining Combinations Affecting Employees; Boycotting; Interfering with Electric Wires.

The foundation of the jurisdiction of equity by way of injunction against torts rests in the probability of irreparable injury, the inadequacy of pecuniary consideration, and the prevention of a multiplicity of suits. High, § 697.

It is a very old head of equity, as Lord Eldon observed, in *Evans v. Bicknell*, 6 Ves. 174, that if a representation be made to another person going to deal in a matter of interest, upon the faith of that representation, the former shall make that representation good, if he knew that representation to be false. He held, that if there was a jurisdiction at law upon the doctrine, in *Paisley v. Freeman*, 3 T. R. 151, there was a concurrent jurisdiction in equity; and that "Case," upon the principle of many decisions in equity, might have been maintained. There is no dispute about that doctrine. It is a principle of universal law. Fraud and damage, coupled together, will entitle the injured party to relief in any court of justice. *Bacon v. Bronson*, 7 Johns. Ch. 194 (200).

It is not sufficient to authorize the remedy by injunction that a violation of a naked legal right of property is threatened. There must be some special ground of jurisdiction, such as injury to the plaintiff's property, inadequacy of the legal remedy, or some pressing or serious emergency or danger of loss or other special ground of jurisdiction shown by the complaint. *McHenry v. Jewett*, 90 N. Y. 58.

The mere allegation of great or irreparable injury apprehended or threatened, which is not supported by facts or circumstances tending to justify it, is clearly insufficient to authorize an injunction restraining a tort. *Brass v. Rathbone*, 153 N. Y. 435 (442).

A court of equity is not bound to issue an injunction when it will produce great private or public mischief, merely for the purpose of protecting a technical or unsubstantial right. *Wormser v. Brown*, 149 N. Y. 163, and cases cited.

While it has very often been held that ordinarily courts of equity will not wield their power simply to redress a trespass, yet they will interfere under peculiar circumstances, and have often done so where the trespass was a continuing one, and a multiplicity of suits was involved in the legal remedy. Where the facts were in doubt, or the right not clear, a court of equity will act only after

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 Art. 2. Civil Remedies for Wrongs.
 

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plaintiff's right has been established at law; but where the occupation of premises threatened to be continuous, and the injury partakes of that character, this is more a rule of discretion than of jurisdiction. *Wheelock v. Noonan*, 108 N. Y. 179, citing *Avery v. N. Y. C. & H. R. R. Co.*, 106 N. Y. 142.

Equity will interfere only when irreparable injury is threatened, and the law does not afford adequate remedy for the contemplated wrong. *Thomas v. M. M. P. Union*, 121 N. Y. 45 (57).

Injury, material and actual, not fanciful or theoretical or merely possible, must be shown to be the necessary or probable result of the action sought to be restrained. *Genet v. D. & H. C. Co.*, 122 N. Y. 505 (529), citing *People v. Canal Board*, 55 N. Y. 390.

Equity does not undertake to relieve from *all* the annoyances caused by those who are inconsiderate of the feelings and business interests of others. On the contrary it is a general rule, which has some exceptions, that it will not undertake to interfere where a party has an adequate remedy at law, and when it does interfere it is guided by principles of equity, which during the long course of its administration have become established. *Marlin Fire Arms Co. v. Shields*, 171 N. Y. 384 (389).

The right to injunction to restrain wrongful acts will be considered under the different causes of action sounding in tort.

#### SUBDIVISION 4.

##### Action for Damages.

The most frequent and familiar damage for torts is the awarding of damages. Whenever an actionable wrong has been done, the party wronged is entitled to recover damages therefor. Pollock on Torts, 211.

The chief remedy given by law for a wrong is an award of money estimated as an equivalent for the damage suffered. Cooley Elements of Torts, 19.

For most wrongs an award of a pecuniary recompense is the sole remedy afforded. Hale on Damages, 2, citing 2 Bl. Comm. 438; 1 Sutherland on Damages, § 7; 1 Sedgwick on Damages, § 5.

Damages may be recovered where a legal wrong has been committed whenever the conduct of the person causing damage is forbidden by law, malicious, negligent, or done at the peril of the person causing such damage; and the law affords compensation for pecuniary losses, direct and indirect; physical pain and inconvenience, and mental suffering. Hale on Damages, 23, 86.

## Art. 3. Jurisdiction.

Damages may be recovered in three classes of cases: For pecuniary loss — where the injury is to person or property; or physical pain and inconvenience suffered — where the injury is to the person; and for mental suffering. Hale, 86.

Recovery can be had, however, for mental suffering only in those cases where the same act that causes such suffering also injures plaintiff in a right protected by law in regard to his person, property, or reputation. Hale, 95.

No recovery can be had for injury sustained by fright occasioned by negligence of another where there is no immediate personal injury. *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107.

But in *Williams v. Underhill*, 63 App. Div. 223, 71 N. Y. Supp. 291, it is held that this rule is not applicable to actions to recover damages for a willful tort and applies only to actions for negligence. Citing *Preiser v. Wielandt*, 48 App. Div. 569, 62 N. Y. Supp. 890.

A statute conferring a new right and a remedy to enforce it will usually be regarded as excluding by implication any resort to a common-law action if the statutory remedy is adequate. 1 Wait's Actions and Defenses, 42; 8 Wait's Actions and Defenses, 4. See *Dudley v. Mayhew*, 3 N. Y. 9; *Small v. Herkimer Mfg. Co.*, 2 N. Y. 330.

The right to recover damages and the rule as to the measure of damages are both fully considered under "Damages."

## ARTICLE III.

## JURISDICTION.

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## SUBDIVISION 1.

## Courts Having Jurisdiction of Actions for Wrongs.

The Supreme Court, by virtue of its general jurisdiction under section 217 of the Code, has jurisdiction of all actions for torts,

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costs being regulated by subdivision 3 of section 3228 in certain classes of torts therein specified in such a manner that if plaintiff recovers less than \$50 damages, the amount of his costs cannot exceed his damages. This rule is doubtless made in view of the fact that a justice of the peace cannot take cognizance of certain torts as provided by section 2863, subdivision 3.

Jurisdiction of the City Court of the city of New York extends to a case against a person or corporation where judgment is demanded for a sum of money not to exceed \$2,000. Code, §§ 315, 316.

And substantially the same provision is made as to jurisdiction of County Courts, where the action is between residents of the same county. Code, § 348.

**SUBDIVISION 2.****Jurisdiction of Actions for Injuries to the Person and Personal Property Outside the State.**

There is no doubt that the Supreme Court has jurisdiction of an action between nonresident individuals, where the wrong or trespass is committed in another jurisdiction. But it can decline jurisdiction in an action of this character, even between natural persons. *Collard v. Beach*, 81 App. Div. 582 (585), 81 N. Y. Supp. 619, citing *Ferguson v. Nelson*, 11 N. Y. Supp. 524, and strongly rebuking the habit of importing such litigations into this jurisdiction, consuming the time of the courts and compelling the people of this State to bear the burden and expense of trying actions which should have been brought in other jurisdictions where the home courts are open to and afford adequate remedies, stating that it has become a great nuisance and a just subject of complaint and protest, citing the language of *Hoes v. N. Y. & H. R. R. Co.*, 73 N. Y. 435 (441), to the effect that if actions are allowed to be brought in this jurisdiction for injuries sustained in other States upon devices as simple and transparent as the one employed in that case it "will open wide the flood gates of litigation in similar cases, establish a new legal industry, and impose thereby upon our already overworked courts the obligation of trying actions imported from a foreign jurisdiction."

The subject is very fully considered and authorities cited in *Wertheim v. Clergue*, 53 App. Div. 122, 65 N. Y. Supp. 750,

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citing the language of Follett, Ch. J., in *Burdick v. Freeman*, 120 N. Y. 420, that "the courts in this State may, in their discretion, entertain jurisdiction of such an action between citizens of another State actually domiciled therein, when the action was begun and tried, though the injury was committed in the State of their residence and domicile."

The opinion proceeds, however, to say that the rule has been fully established in the courts in this State that they will, in the exercise of a sound judicial discretion, decline jurisdiction in actions between foreigners or nonresidents founded upon personal injuries or purely personal wrongs, unless special circumstances are shown to exist which require the retention of jurisdiction.

In *Colorado State Bank v. Gallagher*, 76 Hun, 310, 27 N. Y. Supp. 688, as also in the authorities above cited, *Robinson v. Oceanic Steam Navigation Co.*, 112 N. Y. 315, is distinguished upon the ground as stated in that case that an action cannot be maintained against a foreign corporation upon a cause of action for a tort which did not arise within this State, the rule differing in that respect as to corporations from that which exists as to individuals; but in that case it is said that "the discrimination between resident and nonresident plaintiffs is probably based upon reasons of public policy; that our courts should not be vexed with litigations between nonresident parties over causes of action which arose outside of our territorial limits. Every rule of comity and of natural justice and of convenience is satisfied by giving redress in our courts to nonresident litigants when the cause of action arose, or the subject-matter of the litigation is situated within this State." The distinction is based upon section 1780, Code.

Damages recoverable in tort can only be recovered under the law of the place where the injury occurred. *Torrance v. Third Nat. Bank*, 70 Hun, 44, 23 N. Y. Supp. 1073, citing *Greene v. Van Buskirk*, 5 Wall. 307; *Huntington v. Attrill*, 146 U. S. 666; *Northern Pacific R. R. Co. v. Babcock*, 154 U. S. 190, citing authorities. Same principle, *Stewart v. Baltimore & Ohio R. R. Co.*, 168 U. S. 445.

**SUBDIVISION 3.**

**Jurisdiction of Courts as to Wrongs Relating to Real Estate Outside the State.**

It was held in *Home Ins. Co. v. Pennsylvania R. R. Co.*, 11 Hun, 182 (1887), that in an action brought in this State by an

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insurance company, which had paid to the insured the loss covered by its policy to recover for the burning of a barn (the building insured) in the State of Pennsylvania, through defendant's negligence, was triable in this State, citing *Barney v. Burstenbinder*, 7 Lans. 210; *Gardner v. Ogden*, 22 N. Y. 327. This case does not appear to be subsequently cited upon this point.

*American Union Telegraph Co. v. Middleton*, 80 N. Y. 408 (1880), laid down the rule, "The cases in which an action will lie for an injury in another State or country, to the person or property, are personal and transitory actions which do not relate to the realty, and have no application to an action of trespass *quare clausum fregit*, where the place of trial must be confined to the locality, as is the case here. In cases of this character no action will lie outside of the jurisdiction of the State or country where the cause of action arose.

This was followed by *Cragin v. Lovell*, 88 N. Y. 258, holding that (p. 263) it is a general rule of law that actions for injuries to real property must be brought in the *forum rei sitæ*, and this rule of law has been uniformly sanctioned and upheld in this State.

*Dodge v. Colby*, 108 N. Y. 445 (451), on the authority of 80 N. Y. 408, and 88 N. Y. 258, *supra*, states that the rule that courts in this State have no jurisdiction of actions for trespass upon lands situated in other States is too well settled to admit of discussion or dispute.

*Barrett v. Palmer*, 135 N. Y. 339, upon the authorities above referred to, states the rule to be: "There can be no doubt that an action of trespass *quare clausum fregit* was local in its character, and the courts have no jurisdiction when such trespass is committed upon lands in another State."

*Sentenis v. Ladew*, 140 N. Y. 463, states, "While, as a general rule, an action for injuries to real estate must be brought in the *forum rei sitæ*, the Supreme Court of this State is not prohibited from entertaining an action to recover damages for injuries to real property in another State; and where it acquires jurisdiction of the parties and defendant appears, answers and goes to trial without objecting to the authority of the court to hear the cause, the judgment rendered therein will be neither void nor voidable for want of jurisdiction, but will be binding and conclusive upon the parties."



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All of these authorities are collated and considered in *Sprague Nat. Bank v. Erie R. R. Co.*, 40 App. Div. 69, 57 N. Y. Supp. 844.

It is held in *Ruckman v. Green*, 9 Hun, 225, that an action may be maintained in this State for an injury to land situated herein, though the business which occasions the injury and constitutes the nuisance complained of is carried on upon land situated in the State of New Jersey.

### ARTICLE IV.

#### WAIVER OF TORT AND EFFECT OF ELECTION OF REMEDIES.

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#### SUBDIVISION 1.

##### Waiver of Tort.

In some cases injury sustained by a party from the acts or omissions of another do not only give right of action, but also a right to elect between two or more forms of action, by either of which he may obtain some measure of redress. He may have a right of election between legal and equitable remedies or between an action in tort and an action on contract. 8 Wait's Actions and Defenses, 4.

"The line of demarcation between contracts and torts is not perfectly defined. Many torts arise out of a state of facts which constitute also a breach of contract, and in that event the injured party may elect to bring his action either *ex contractu* or *ex delicto*. Again, there are cases in which a tort may be so committed as to give rise to an implied contract; as where one wrongfully disposes of the property of another and receives the consideration therefor. In such cases the injured party may waive the tort, and sue on the contract for the consideration received by the wrongdoer." 26 Am. & Eng. Encyc. of Law (1st ed.), 73.

If the contract contain a false warranty, it is broken in the breach of the warranty, and breach of an affirmative warranty, fraudulently made, may be treated as a tort. So, too, what is of much importance, a contract founded upon a false and fraudulent

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representation, though not amounting to a warranty, may be repudiated, and an action for tort maintained; or the contract may be treated by the injured party as binding, and an action for tort brought to recover damages for the loss caused by getting him into the contract. Bigelow on Torts, p. 26.

This rule seems to have been laid down in *Lamine v. Dorrell*, 2 Ld. Raym. 1216, cited in Keener, 170, where Powell, J., said: "When the act that is done is in its nature tortious, it is hard to turn that into a contract, and against the reasons of assumpsit. But the plaintiff may dispense with the wrong, and suppose the sale made by his consent, and bring an action for the money they were sold for, as for money received to his use."

In Hale, 20, it is said that perhaps the most singular anomaly in the law is to be found in the holding that an action on contract will lie for a tort pure and simple. Illustrating the statement by the proposition that if a man steals goods of another, the latter may waive the tort and sue on contract, although no contract exists. So, also, if goods have been sold not by mistake, but through fraudulent misrepresentation, the seller may sue in tort, because of the deceit, or on contract for the value of the goods. Citing *Hill v. Perrott*, 3 Taunt. 274; *Young v. Marshall*, 8 Bing. 43; *Hawk v. Thorn*, 54 Barb. 164.

The latter case holds that when a person has unlawfully taken possession of another's property, the tort may be waived and an action brought for its value, and further that such a cause of action is assignable.

When a conversion consists of a wrongful sale of goods the owner of them may waive the tort and sue by a count for money had and received for the price which the defendant obtained for them. Moak's Underhill on Torts, 607, citing *Lamine v. Dorrell*, 2 Ld. Raym. 1216; *Oughton v. Seppings*, 1 B. & Ad. 241.

Bishop, § 73, lays down the rule that in a certain class of cases the party injured by the nonfulfillment of a duty may proceed against the other for its breach, or for the breach of the contract out of which the nonfulfillment arose, at his election. Citing *Church v. Mumford*, 11 Johns. 479; *Rawson v. Dole*, 2 Johns. 454, the latter case in its turn citing *Bonafous v. Walker*, 2 T. R. 126.

It is well settled that in a variety of cases a plaintiff may waive the tort and sue in contract, and *vice versa*. He has an election of

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action. It was said in the old practice that case and assumpsit were oftentimes concurrent remedies. *Govett v. Radnidge*, 3 East, 70, cited in *Butts v. Collins*, 13 Wend. 138 (154), citing numerous other authorities, and holding the rule that where a defendant has been guilty of a tortious neglect of duty, the plaintiff may waive the tort and rely upon the circumstances as forming a breach of promise implied from some consideration of reward.

Erwin on Torts (p. 14): "The general result of all the decisions is well stated in a note to *Cabell v. Vaughan*, 1 Wms. Saund. (5th ed.) 291, and is in substance this: Where the action is maintainable for the tort simply, without reference to any contract made between the parties, no objection can be raised on the ground that the plaintiff should have declared upon the contract, as for instance, in actions against common carriers, founded on the custom of the realm, and the like. But where the action is not maintainable without referring to a contract between the parties, and laying a previous ground for it by showing such contract, there the plaintiff must proceed upon the contract, and a special action on the case will not lie."

In *People v. Gibbs*, 9 Wend. 30 (33), Savage, Ch. J., quotes Lord Mansfield as laying down the general rule which has ever since been considered correct, bearing upon the right to waive a tort and sue upon contract. "If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, then the person injured has only a reparation for the *delictum* in damages to be assessed by a jury; but where, besides the crime, property is acquired, which benefits the testator, then an action for the value of the property shall survive against the executor, as for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees, he shall."

Where a wrongdoer sells property illegally taken, the owner may waive the tort and sue for money had and received, and where the property taken is money it may be recovered in such an action without waiting for the formality of a sale. *Tryon v. Baker*, 7 Lans. 511, citing *Harpending v. Shoemaker*, 37 Barb. 270.

*Harway v. Mayor*, 1 Hun, 628, cites *Chambers v. Lewis*, 2 Hilt. 591; *Putnam v. Wise*, 1 Hill, 235, 240, note; *Neale v. Hard-*

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ing, 6 Exch. 349, holding it is a well-settled law that "if one has obtained money from another, through the medium of oppression, imposition, extortion, or deceit, such money is, in contemplation of law, money received for the use of the injured party; it is not the money of the wrongdoer, and he has no right to retain it, and the law, therefore, implies a promise from him, to return it to the rightful owner, whose title to it cannot be destroyed and annulled by the fraudulent and unjust dispossession. The tort may be waived, and an action brought for the recovery of the money, upon implied contract. \* \* \* The defrauded party in such case has a choice of remedies. He may pursue the person guilty of the fraud in an action of tort for damages sustained by the injury, or waiving that remedy, he may treat the matter as simple debt, and proceed upon the implied contract to repay the money."

"The general classification being made of the actions *ex contractu* and those *ex delicto*, there were many cases in which a party who had suffered a wrong by the conversion or the taking and carrying away of his chattels might waive the tort, and bring an action of assumpsit upon the wrongdoer's implied promise to pay the price of the articles taken. The same election still exists. Wherever the plaintiff who could sue in 'trespass' or 'trover' might, if he chose, bring 'assumpsit,' he may now waive the tort, and maintain an action upon an implied promise and recover the price of the goods, as though there had been a sale. This choice, however, does not relate to the external form of an action; it relates to the very cause of action itself,—to the unchangeable rights which are to be protected and enforced by the judicial proceeding. In one instance, the plaintiff is permitted to view the transaction as an injury to his property, by which he has sustained damages which amount to the entire value of that property. In the other, he views the transaction as a sale, by which the title to the property has passed to the defendant, and a duty to pay the price rests upon him. For reasons of public policy, the law allows the injured party to make his choice between these two quite different versions of the same transaction; and, although one of them may be a fictitious view, substantial justice is done thereby." Pomeroy's Code Remedies, p. 140, citing *Conaughty v. Nichols*, 42 N. Y. 83; *Ross v. Mather*, 51 N. Y. 108; *Ledwich v. McKim*, 53 N. Y. 307 (316); *Graves v. Waite*, 59 N. Y. 156; *Matthews v. Cady*, 61 N. Y. 651; *Greentree v. Rosenstock*, 61 N. Y. 583, 588-590; *Nef-*

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*tel v. Lightstone*, 77 N. Y. 96; *Fields v. Bland*, 81 N. Y. 239; *Neudecker v. Kohlberg*, 81 N. Y. 296; *Sparman v. Keim*, 83 N. Y. 245, 249; *Lockwood v. Quackenbush*, 83 N. Y. 607; *Harrington v. Bruce*, 84 N. Y. 103; *Osborn v. Bell*, 5 Den. 370; *Schroeppel v. Corning*, 6 N. Y. 107; *Cobb v. Dows*, 10 N. Y. 335; *Allen v. Brown*, 51 Barb. 86, 44 N. Y. 228; *Berly v. Taylor*, 5 Hill, 577; *Tryon v. Baker*, 7 Lans. 511.

That the plaintiff may waive a tort, and proceed upon an implied contract, see *City National Bank v. National Park Bank*, 32 Hun, 105 (111); *Byzbie v. Wood*, 24 N. Y. 607; *Austin v. Rawdon*, 44 N. Y. 63; *Kilbourne v. Supervisors*, 137 N. Y. 170 (177).

The right of a plaintiff to waive a tort is clear. *Goodwin v. Griffis*, 88 N. Y. 639.

It is optional for the injured party to waive the tort and rely upon contract, if he chooses to do so, where the facts authorize such an action. A right to waive a cause of action in tort, and found the right upon contract, whether express or implied, is unquestionable, and there is no power with the defendant or any court to compel the plaintiff to proceed upon the tort. *People v. Wood*, 121 N. Y. 522 (529).

In *Abbott v. Blossom*, 66 Barb. 353, at 356, the language of Tindal, J., in *Young v. Marshall*, 8 Bing. 43, is cited: "No party is bound to sue in tort, where, by converting the action into an action of contract, he does not prejudice the defendant, and, generally speaking, it is more favorable to the defendant that he should be sued in contract, because that form of action lets in a set-off, and enables him to pay money into court." And it may be added, under our law, in the absence of fraud, relieves him from the liability to arrest.

"The principle upon which this right to waive the tort and sue in assumpsit rests, as we understand it, is, that as a party cannot set up or take advantage of his own wrong, he cannot be permitted to say he is not liable for the value of the goods, or for the money received on the sale of them, for the reason that his act of appropriation was a tort."

In *Wigand v. Sichel* (Court of Appeals), 33 How. Pr. 174 (176), Hunt, J., says that plaintiffs are not bound to bring an action for each deceit, or of trover or of replevin, but can waive the tort and bring an action on contract. This rule is recognized in *McGold-*

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*rick v. Willits*, 52 N. Y. 612 (620), cited with approval in *Knapp v. Simon*, 96 N. Y. 292.

A fraudulent sale of goods may be charged in an action on contract for the price, or in an action for tort as a trespasser at the election of the injured party. *Cary v. Hotaling*, 1 Hill, 311.

Where goods deposited are wrongfully sold by the bailee the owner may sue in trover or waive the tort and sue in assumpsit. *Berly v. Taylor*, 5 Hill, 577.

So if a pledgee refuses to restore property to a pledgor upon demand and performance of the obligation to secure which the pledge was made, an action may lie either on contract or in tort. *International Bank v. Monteath*, 39 N. Y. 297; *Tryon v. Baker*, 7 Lans. 511.

In *Comstock v. Hier*, 73 N. Y. 269, it was held that plaintiff had an election either to bring an action for trover for the conversion of a note, or for money had and received, to recover money realized by defendant on the sale thereof.

In *Thayer v. Manley*, 73 N. Y. 305, it was held that although in that case plaintiff had a remedy by an equitable action to compel the cancellation and surrender of certain notes, he was not obliged to resort to that remedy, but might sue for the conversion.

In *Byrbee v. Wood*, 24 N. Y. 607, and *Union Bank v. Mott*, 27 N. Y. 633, the question is discussed as to what allegations in the complaint are to be regarded as determining whether the action is in tort or upon contract.

Where the cause of action set forth is doubtful or ambiguous from intendment, the rule is in favor of construing it as in the nature of an action *ex contractu*, rather than *ex delicto*. *Goodwin et al. v. Griffis*, 88 N. Y. 629 (639).

And an action brought upon contract cannot be changed to an action *ex delicto*, and a recovery had. *Munger v. Hess*, 28 Barb. 75 (78), citing 2 Kent Comm. 241.

There is a manifest hardship in allowing a recovery for a tort in an action *ex contractu*, for the reason that such a recovery might subject the defendant to an imprisonment of his person. *Beard v. Yates*, 5 T. & C. 76 (79); s. c., 2 Hun, 466.

Our courts allow an election between contract and tort to be made in all cases where the plaintiff would have been allowed to pursue his remedy in tort, and it is said in *Roth v. Palmer*, 27 Barb. 652 (655), that the decisions of the court have been too

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numerous and too uniform to allow any distinction or limitation upon this rule. Citing numerous authorities.

"Where an agent converts property of his principal in his hands, and which he has agreed to account for and pay over, the principal has his election to sue for the breach of the contract or for the conversion; and if he elects to proceed for a breach of the contract, he may interpose it as a counterclaim in an action upon contract brought against him by the agent." *Coit v. Stewart*, 50 N. Y. 17.

In *Terry v. Munger*, 121 N. Y. 161, it was held that the owner of personal property which has been wrongfully converted by another, may, although the property is retained by the wrongdoer, waive the tort and sue for and recover its value upon an implied contract of sale. Cited and followed in *Disbrow v. Westchester Hardwood Co.*, 164 N. Y. 415 (424).

In *Rice v. Manley*, 66 N. Y. 82, the question is considered as to the right to maintain an action for tort where the contract was not binding under the statute of frauds.

Where goods were sold upon a credit extended to defendant in reliance upon the false and fraudulent statement made by him, the plaintiffs have the right either to disaffirm the sale and proceed in replevin to recover their goods, or they can waive the tort and proceed in assumpsit for the purchase price of the goods. *Heilbron v. Herzog*, 165 N. Y. 98.

The tort may be waived in order that a claim may be used by way of set-off. *Coit v. Stewart*, 50 N. Y. 17; *Wood v. Mayor*, 73 N. Y. 556.

But a counterclaim arising out of the same transaction cannot be defeated by changing the form of action, nor can a discharge in bankruptcy be thus avoided. *Campbell v. Perkins*, 8 N. Y. 430; *Thompson v. Kessell*, 30 N. Y. 383.

Where a complaint sets forth a cause of action *ex contractu* an allegation therein of a legal conclusion having the aspect of a tort, does not change the nature of the action. *Greentree v. Rosenstock*, 61 N. Y. 583; *Conaughty v. Nichols*, 42 N. Y. 83.

### SUBDIVISION 2.

#### What Constitutes an Election.

In *Droege v. Ahrens & Ott Mfg. Co.*, 163 N. Y. 466 (470), it is said: "It was observed by Chancellor Kent in *Sanger v. Wood*, 3 Johns. Ch. at p. 421, that 'any decisive act of the party, with

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knowledge of his rights and of the fact, determines his election in the case of conflicting and inconsistent remedies.' This is the principle upon which is based the doctrine of the election of remedies, where two exist in a given case which are substantially inconsistent."

It was also held: "A vendor cannot affirm the existence of a contract of sale for the purpose of a recovery under it, and subsequently treat the contract as avoided by the fraud of the vendee, provided the act in affirmation was with knowledge of the essential facts constituting the fraud; and where with such knowledge the vendor files a verified proof of claim for the purchase price with the assignee of the insolvent vendee, it is such an election by the vendor to ratify the contract of sale as will preclude him from thereafter maintaining an action to rescind it upon the ground of fraud."

In *Deitz v. Field*, 10 App. Div. 425, 41 N. Y. Supp. 1087, the rule is reiterated that the current of authorities in this State is to the effect that where a party has the choice between two inconsistent remedies, the commencement of an action will be deemed a conclusive election between them. Distinguishing 103 N. Y. 27, upon the ground that there was no finding or request to find that the plaintiffs, when they brought the action on the contract, knew of the tort. Citing *Conrow v. Little*, 115 N. Y. 387, and distinguishing *Smith v. Savin*, 141 N. Y. 317; *Russell v. McCall*, 141 N. Y. 437, following *Terry v. Munger*, 121 N. Y. 161; *Moller v. Tuska*, 87 N. Y. 166; *Fowler v. Bowery Savings Bank*, 113 N. Y. 450.

In *Equitable Co-operative Foundry Co. v. Hersee*, 33 Hun, 169, authorities are cited tending to hold that where certain classes of actions have been commenced and not prosecuted to judgment, it does not constitute an election. Same case, 103 N. Y. 25, it was held that the mere bringing of an action for the price of goods sold is not a binding election of remedies, or a waiver of the right to rescind the sale on the ground of short notice. The action was brought without knowledge of the fraud.

In the following cases it is held that the action of the plaintiff had been such as to amount to an election: *Drennan v. Boice*, 19 Misc. Rep. 641, 44 N. Y. Supp. 394; *Seeman v. Bandler*, 26 Misc. Rep. 372, 56 N. Y. Supp. 210, affirming 25 Misc. Rep. 328, 54 N. Y. Supp. 564; *Terry v. Buek*, 40 App. Div. 419, 57 N. Y.



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Supp. 980, citing *Fowler v. Bowery Savings Bank*, 113 N. Y. 453; *Riley v. Albany Savings Bank*, 103 N. Y. 669; *Harris v. Pryor*, 44 St. Rep. 495, 18 N. Y. Supp. 128.

As to what action by the plaintiff does not constitute an election, see *Cook v. Adams*, 32 App. Div. 385, 53 N. Y. Supp. 120; *Henderson v. Bartlett*, 32 App. Div. 435, 53 N. Y. Supp. 149; *Rhineland v. National City Bank*, 36 App. Div. 11, 55 N. Y. Supp. 229; *Haas v. Selig*, 27 Misc. Rep. 504, 58 N. Y. Supp. 328, affirming 26 Misc. Rep. 191; *Schaut v. Schaueroth*, 46 App. Div. 450, 61 N. Y. Supp. 767; *American Box Machine Co. v. Zentgraf*, 45 App. Div. 522, 61 N. Y. Supp. 417; *Lindsay v. Gager*, 11 App. Div. 93, 42 N. Y. Supp. 851; *Koke v. Balken*, 15 App. Div. 415, 44 N. Y. Supp. 426.

"Where a vendor, having no knowledge of fraudulent representations, by which he was induced to make a sale of goods to the vendee, sues for the price of the goods and recovers an uncollectible judgment, that action cannot be deemed an election of remedies by the vendor, which will bar a subsequent action by him to recover damages for the fraud." *Albany Hardware & Iron Co. v. Day*, 11 App. Div. 230, 42 N. Y. Supp. 971, citing *Rochester Distilling Co. v. Devendorf*, 72 Hun. 428, 25 N. Y. Supp. 200; *Equitable Co-operative Foundry Co. v. Hersee*, 103 N. Y. 25; *Hays v. Midas*, 104 N. Y. 602, and distinguishing *Caylus v. N. Y., K. & S. R. R. Co.*, 76 N. Y. 609.

*Albany Hardware Co. v. Day*, *supra*, is also reported in 4 N. Y. Annot. Cas. 90, and followed by a careful and valuable note on "Remedy for Tort after Suit on Contract," in which it is said that it appears to go farther than any of the prior decisions on the point there involved, and that it is difficult to harmonize it with *Cormier v. Hawkins*, 69 N. Y. 188, citing *Underhill v. Ramsey*, 125 N. Y. 681; *Crossman v. Universal Rubber Co.*, 127 N. Y. 35; *Conrow v. Little*, 115 N. Y. 387; *Bach v. Tuch*, 126 N. Y. 53; *Robert v. Winne*, 144 N. Y. 709.

### SUBDIVISION 3.

#### Effect of Election of Remedies.

Keener on Quasi-Contracts, 159, says that the doctrine of waiver of tort is simply a question of the election of remedies, and cites *Cooper v. Cooper*, 147 Mass. 370, as follows: "The same

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act or transaction may constitute both a cause of action in contract and in tort, and a party may have an election to pursue either remedy; and in that sense may be said to waive the tort and sue in contract."

Frequently a party may elect to sue either in tort or contract, and such election is binding on the party making it, and he cannot afterward pursue an inconsistent remedy, though full recovery was not had in the first action; but it is a general principle that an allegation is not binding unless made with a knowledge of the circumstances of the case. 6 Encyc. of Law (1st ed.), 250.

Where remedies are not concurrent, and a choice has once been made, the right to follow the other is gone, and any decisive acts of the party, with the knowledge of his rights and of the effect determines his election in the case of conflicting remedies. *Littlefield v. Brown*, 1 Wend. 398, 7 Wend. 454, 11 Wend. 467; *McElroy v. Mancius*, 13 Johns. 122; *Rawson v. Turner*, 4 Johns. 469; *Masson v. Bovet*, 1 Den. 69; *Kinney v. Kiernan*, 49 N. Y. 164; *Wright v. Pierce*, 4 Hun, 351; *Smith v. Knapp*, 30 N. Y. 581; *Hughes v. Vermont Copper Mining Co.*, 72 N. Y. 209; *Voorhees v. Earl*, 2 Hill, 288; *Morris v. Rexford*, 18 N. Y. 552; *Lloyd v. Brewster*, 4 Pai. 537; *Goss v. Mather*, 2 Lans. 283; *Wile v. Brownstein*, 35 Hun, 68; *Boots v. Ferguson*, 46 Hun, 131; *Riley v. Albany Savings Bank*, 36 Hun, 522; *Bank of Beloit v. Beale*, 39 N. Y. 473; *Rodermund v. Clark*, 46 N. Y. 354; *Kennedy v. Thorp*, 51 N. Y. 174; *Fields v. Bland*, 81 N. Y. 239.

There can be no recovery for a breach of contract where fraud is the basis of the complaint. *Ross v. Mather*, 51 N. Y. 108; *Greentree v. Rosenstock*, 61 N. Y. 583; *Conaughty v. Nichols*, 42 N. Y. 83; *Barnes v. Quigley*, 59 N. Y. 267.

Where, at the commencement of the action for tort, an action on contract for the same cause of action is pending, plaintiff is bound to elect between them. *Bowker Fertilizing Co. v. Cox*, 106 N. Y. 559.

Where a party has elected between inconsistent remedies, he is confined to the remedy which he has adopted. *Boots v. Ferguson*, 46 Hun, 131; *Bank of Beloit v. Beale*, 34 N. Y. 473; *Rodermund v. Clark*, 46 N. Y. 354.

An action cannot be amended by changing the complaint from tort to contract on the trial (*Cushman v. Jewell*, 7 Hun, 525), although mere allegations of fraudulent representations do not

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determine the question that the action is for a tort. *Sparmann v. Keim*, 83 N. Y. 245.

The rule that a party cannot pursue two inconsistent remedies is very fully discussed and the authorities collated in *Fowler v. Bowery Savings Bank*, 113 N. Y. 450, reversing 47 Hun, 399, 23 Abb. N. C. 133; 4 Lawyers' Rep. Annot. 145. See notes in both last-named reports.

A party electing to sue and recover for the value of property must be held to have waived the tort and must rely upon the contract of sale, which in such a case the law implies. *Disbrow v. Westchester Hardwood Co.*, 164 N. Y. 415 (424).

In *Hopf v. United States Baking Co.*, 6 Misc. Rep. 158, 27 N. Y. Supp. 217, it is said, citing *Garrison v. Marie*, 7 Civ. Proc. 121: "When a person has made an election as to rights, he should not afterward be permitted to change his position and set up an inconsistent right." Citing also *Rich v. Niagara Savings Bank*, 3 Hun, 485; *Hughes v. Vt. Copper Mining Co.*, 7 Hun, 768; *Dinsmore v. Duncan*, 57 N. Y. 580.

When it becomes necessary to elect between inconsistent rights and remedies, the election when made will be final and cannot be reconsidered. *Terry v. Munger*, 121 N. Y. 161; *Rodermund v. Clark*, 46 N. Y. 354.

Any decisive act of the party with knowledge of the rights and of the facts, determines his election in the case of conflicting and inconsistent remedies. *Sanger v. Wood*, 3 Johns. Ch. 421, cited in *Droege v. Ahrens & Ott Mfg. Co.*, 163 N. Y. 466 (470), the latter case citing *Mills v. Parkhurst*, 126 N. Y. 89; *Conrow v. Little*, 115 N. Y. 387.

The rule prohibiting a party who had adopted and pursued one of two remedies, from afterward availing himself of the other, is limited to cases where the two remedies are inconsistent. *Crossman v. Universal Rubber Co.*, 127 N. Y. 34.

(See "Torts Arising From or Connected With Contracts," art. V, chap. III, p. 41.)

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ARTICLE V.

JOINDER OF PARTIES.

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SUBDIVISION 1.

Joinder of Plaintiffs.

This subject will be treated very briefly, since the right of action has been fully considered under the title "Rules Governing Liability of Parties in Torts," chap. IV, and for the further reason that the provisions of the Code, §§ 446, 447, 448, relating to joinder of parties, fully cover actions for torts. Comparatively few questions arise thereunder aside from those considered in connection with the rule as to joint tortfeasors. Chap. IV, *supra*.

Joint owners of property must unite in an action for injuries thereto, or for the conversion thereof. When their injuries are separate, two or more may not join as plaintiffs in an action of tort, though the injuries are occasioned by a single act. But when a joint interest is injured, the owners thereof may unite as plaintiffs. 17 Am. & Eng. Encyc. of Law (1st ed.), 599.

Tenants in common must unite in an action for trespass upon real property. *De Puy v. Strong*, 37 N. Y. 372, cited *Eckerson v. Village of Haverstraw*, 6 App. Div. 102 (106), 39 N. Y. Supp. 635. And in ejectment to recover the possession of property, each may sue separately for his share. *Hasbrouck v. Bunce*, 62 N. Y. 476.

Persons having separate interests are sometimes allowed to unite to restrain a common injury. *Kennedy v. City of Troy*, 14 Hun, 308.

Owners in severalty of premises occupied by them, upon a mill stream, and of the right of water used by them, may unite in an action against another several owner, to restrain him from using more water than he is entitled to. In such a case, where the injury consists in diverting the water, and it affects all the several owners in the same way, and at the same time, the interest is a common one, and one which entitles the owners in severalty to unite. *Emery v. Erskine*, 66 Barb. 9.

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Different riparian owners of distinct parcels of riparian land, who have a common grievance for an injury of the same kind, inflicted at the same time and by the same acts, though the injury differs in degree as to each owner, may unite in a common action to enjoin a higher riparian owner from diverting or polluting the stream. *Strobel v. Kerr Salt Co.*, 164 N. Y. 305.

In a case of a private nuisance or any grievance which is common to several distinct and separate owners, they may unite in a single action for its removal, or to be relieved from it. *Foot v. Bronson*, 4 Lans. 47.

Where a cause of action arises out of a single tort, and the plaintiff has a direct interest therein, and his insurers have an interest by subrogation, all should be joined in one action to prevent multiplicity of suits. *Munson v. N. Y. C. & H. R. R. Co.*, 32 Misc. Rep. 282.

"Several plaintiffs may not join in one suit against a defendant for matters and claims entirely distinct and disconnected, but it is authorized, where plaintiffs having a common interest, centering in the point in issue, and when one general right by all is claimed by way of relief in the action." Plaintiffs, although separate owners of premises charged to be injured and threatened with injury, may each join in an action to abate a nuisance and for an injunction to prevent its enhancement and continuance. *Gillespie v. Forrest*, 18 Hun, 110 (112); *Astor v. N. Y. Arcade R. R. Co.*, 3 St. Rep. 188, 113 N. Y. 93; *Goelet v. Metropolitan Co.*, 48 Hun, 520.

Where plaintiffs acted jointly in the execution of an undertaking, on appeal it was held that they were jointly defrauded by defendant and were entitled to maintain joint action. *Bates v. Merrick*, 2 Hun, 568.

The lessee of a store may join his lessor as a party plaintiff in an action to compel the removal of a show-case placed on the sidewalk by defendant in front of his premises, so as to exclude the light from his windows. *Hallock v. Scheyer*, 33 Hun, 111.

Where plaintiffs were induced by an act of fraud practiced upon them to execute a joint release they were held entitled to maintain a joint action to set the same aside. *Smith v. Schutting*, 14 Hun, 52.

This was held upon the ground that there was one connected interest among them, all centering in the principal point in issue.

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When two stockholders, acting in unison and through the false representation of a third made to one of them, but intended to influence both, are led to make a sale of their respective shares of stock upon an agreement made with one or both, for a consideration far below its actual value, they may join as plaintiffs in one action to obtain a rescission of the sale for such fraud and the restoration of the stock. *Bradley v. Bradley*, 165 N. Y. 183.

It is not always necessary that all parties having the same interest as plaintiffs should be made parties to the suit. *Mitchell v. Thorn*, 57 Hun, 405, 10 N. Y. Supp. 682, 25 Abb. N. C. 295.

A joint action for damages cannot be maintained against defendants, who have conspired to obtain goods on credit, by a number of parties plaintiffs, all of whom independently of the others have sold goods to the defendants on such fraudulent credit. *Gray v. Rothschild*, 48 Hun, 596, 1 N. Y. Supp. 299. On affirmance, 112 N. Y. 669, the court said: "It may very well be that each plaintiff has a good cause of action against the defendants, but the plaintiffs have none common to all or jointly with each other. Each individual and each firm may have been defrauded by similar, although not the same representations, but the complaint shows that each has suffered separately, and its whole scope and meaning is inconsistent with the idea that the plaintiffs, or any two or more of them, are jointly prejudiced."

An action was brought against defendant by a widow and her children to recover for defendant's wrongful conduct as special guardian on the sale of testator's real estate. It was held that two causes of action were improperly joined, as the rights of the widow and her children were different. *Hynes v. Farmers' Loan & Trust Co.*, 31 St. Rep. 136, 9 N. Y. Supp. 260.

Where a person liable to several persons jointly for a tort settles with one, this severs the cause of action, and the others may maintain actions for their damages. *Woodbury v. Delos*, 65 Barb. 501.

**SUBDIVISION 2.****Joinder of Defendants.**

The general rule is laid down (Bishop, § 521), that one who has suffered from the joint tort of several persons may bring his suit against all of them collectively, or any one or number less than all at his election; unless the tort is founded upon a joint

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contract or the like, where all defendants must be joined. Citing among other authorities *Lowe v. Mumford*, 14 Johns. 426; *Knickerbacker v. Colver*, 8 Cow. 111.

Joint wrongdoers may be sued separately and the plaintiff may prosecute the same until the amount is ascertained by verdict. *Lovejoy v. Murray*, 3 Wall. 1; *Sessions v. Johnson*, 95 U. S. 347, citing *Knickerbacker v. Colver*, 8 Cow. 111; *O'Shay v. Kirker*, 4 Bosw. 120.

Wait's Law and Practice, vol. 3, p. 70, lays down the general rule as to joinder of defendants in actions for torts, that in an action for a tort unconnected with contract, where the wrong was committed by several persons, the plaintiff has his election to sue them all jointly, or to sue more than one of them separately, citing *Livingston v. Bishop*, 1 Johns. 290; *Rose v. Oliver*, 2 Johns. 365; *Marsh v. Berry*, 7 Cow. 344; *Osterhoudt v. Roberts*, 8 Cow. 43; *Wehle v. Butler*, 3 Jones & Sp. 1, 43 How. 5, 12 Abb. (N. S.) 130, 61 N. Y. 245; *Hun v. Cary*, 82 N. Y. 65; *Roberts v. Johnson*, 58 N. Y. 613.

Two railroad companies operating intersecting lines of track are jointly and severally liable for injuries received by a passenger in a collision resulting from their joint negligence, although one company may have been more negligent than another. The injured passenger may sue one company or both at his election. *Colegrove v. N. Y. & H. R. R. Co.*, 20 N. Y. 492.

Tort feorsors cannot be sued jointly unless the tort has been committed by their joint act, or they are jointly guilty of the negligence or breach of duty causing the injury. The several acts of different people, although resulting in but one injury, will not authorize their joinder as defendants. Nor the joint act of dogs, cattle, or horses, if owned severally and kept separately. 17 Encyc. of Law (1st ed.), 604, citing *Russell v. Tomlinson*. 2 Conn. 206; *Denny v. Correll*, 9 Ind. 72; *Dyer v. Hutchins*, 87 Tenn. 198. See *Cogswell v. Murphy*, 46 Iowa, 44.

Where more than one of the members of a firm have wrongfully converted plaintiff's property, plaintiff may proceed against any of the tort feorsors without joining the others. *Holt v. Streeter*, 74 Hun, 538, 26 N. Y. Supp. 843.

In an action sounding in tort plaintiff is at liberty to sue any one of the alleged wrongdoers. One of several joint owners of land may be sued alone for damages for the overflow of adjoining lands. *Garrett v. Wood*, 13 App. Div. 8, 43 N. Y. Supp. 125.

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A party wronged may bring an action against one of two wrongdoers, and the fact that the other has not been joined is not a defense. *Koke v. Balken*, 73 Hun, 145, 25 N. Y. Supp. 1038, affirmed 148 N. Y. 732.

Where two towns are jointly liable for negligence in respect to a bridge upon the boundary line, they may be sued severally as well as jointly by the party aggrieved. *Clapp v. Town of Ellington*, 87 Hun, 542, 34 N. Y. Supp. 283, affirmed 154 N. Y. 781.

In an action against two or more defendants for conspiring to commit a wrongful act, which is capable of being committed, and was in fact committed by one alone, a recovery may be had against the one who committed the act. *Keit v. Wyman*, 67 Hun, 337, 22 N. Y. Supp. 133.

Where sheriff is liable for misfeasance of his deputy, they may be sued jointly. *Waterbury v. Westervelt*, 9 N. Y. 598.

A joint action will lie against principal and agent for personal injury caused by negligence of the latter in the course of his employment. *Phelps v. Wait*, 30 N. Y. 78.

A fraudulent purchaser of goods may be sued jointly with his assignees for the benefit of creditors to recover possession. *Jessop v. Miller*, 1 Keyes, 321, 2 Abb. Dec. 449.

Where goods are obtained by fraud, the vendor may maintain a joint action to reobtain possession against the fraudulent vendee and his assignee for the benefit of creditors. *Nichols v. Michael*, 23 N. Y. 264.

Where an individual and a municipal corporation are jointly liable for a misfeasance, they may be joined in one action. *Van Wagenen v. Kemp*, 7 Hun, 328.

Where a number of persons assert a public right to float logs in a public stream they may be united as defendants in an action by the owner to enjoin the trespass and establish his rights. *Meyer v. Phillips*, 97 N. Y. 487.

An action based upon a tort committed by all the members of an unincorporated association, acting through the association, may under section 1919 be maintained against the president or treasurer of the association. A complaint in such action is not demurrable because some of the joint tortfeasors have not been made parties defendant; nor does the fact that parties have been improperly made defendants render it demurrable as to a person who has been properly made defendant. *Rourke v. Elk Drug Co.*, 75 App. Div. 145, 77 N. Y. Supp. 373.



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Where defendants are severally as well as jointly liable as tortfeasors the fact that one defendant severally liable is not served does not stay the action as against the others. If the summons is issued against all and only served on one or more severally liable, the plaintiff may proceed against those served as if they were the only defendants named. *Rappaport v. Werner*, 34 App. Div. 525, 54 N. Y. Supp. 481, citing Code, § 456.

The rules of law governing the liability of joint wrongdoers and right of contribution as among themselves, are considered under "Joint Tort Feasors," chapter IV.

## ARTICLE VI.

### JOINDER OF CAUSES OF ACTION.

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#### SUBDIVISION 1.

##### Joinder of Causes of Action.

An action for false imprisonment and one for malicious prosecution may be joined. Code, § 484; *Thorp v. Carvalho*, 14 Misc. Rep. 554, 36 N. Y. Supp. 1, citing *Marx v. Townsend*, 97 N. Y. 594; *Cunningham v. East River Electric Light Co.*, 42 St. Rep. 212, 17 N. Y. Supp. 372; *Neal v. Thorn*, 88 N. Y. 270. Same ruling, *Castro v. Uriart*, 2 Civ. Proc. 210; *Barr v. Shaw*, 10 Hun, 560.

Cause of action for false and fraudulent representations inducing plaintiff to sign a bond for the payment of money may be joined with cause of action for conversion of plaintiff's property by defendant, since both causes of action are for injury to personal property. *Silver v. Holden*, 6 Civ. Proc. 121.

Assault and false imprisonment may be joined. *Daly v. Wolanek*, 29 Misc. Rep. 162, 60 N. Y. Supp. 162.

For commissions earned and wrongful discharge. *Van Keuren v. Miller*, 78 Hun, 173, 28 N. Y. Supp. 971.

Trespass upon land and conversion of personal property where both arise out of the same transaction. *Polley v. Wilkisson*, 5 Civ. Proc. 135.

A cause of action against defendants individually, as trustees,

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may be joined with one to enforce their liability as stockholders. *Sterne v. Herman*, 11 Abb. (N. S.) 376.

As to the rule with reference to enforcing liability of directors with other causes of actions, see *Cummings v. American Gear Co.*, 87 Hun, 598, 34 N. Y. Supp. 541; *Bonnell v. Griswold*, 68 N. Y. 294; *Benedict v. Guardian Trust Co.*, 58 App. Div. 302, 68 N. Y. Supp. 1082; *Bonnell v. Wheeler*, 1 Hun, 332.

An action for money had and received; for money collected for a third person and directed to be paid plaintiff, and for moneys assigned to plaintiff, and in defendant's hands as attorney, may be joined. *Fiss v. Van Schaick*, 63 App. Div. 300, 71 N. Y. Supp. 588.

A cause of action on contract for breach of a covenant of quiet enjoyment contained in a lease, and one in tort for unlawfully entering into apartments leased and injuring the lessee's property therein, cannot be joined. *Keep v. Kaufman*, 56 N. Y. 332.

Where one cause of action is upon contract and another upon statute for a penalty or forfeiture, the two causes of action did not arise out of the same transaction or transactions connected with the same subject, within the meaning of the Code. *Wiles v. Suydam*, 64 N. Y. 173.

A cause of action for slander cannot be joined with one for false imprisonment in the same complaint, although they both arose at the same time, and it does not follow, as matter of law, that two causes of action arising simultaneously from the happening of one event necessarily arise from the same transaction. *De Wolfe v. Abraham*, 151 N. Y. 186, 3 N. Y. Annot. Cas. 310, followed by note on "Joinder of causes of action growing out of the same transaction." Citing, among other authorities, *Marks v. Townsend*, 97 N. Y. 590; *Neil v. Thorn*, 88 N. Y. 270, to the point that causes of action for malicious prosecution and false imprisonment may be united in the same complaint, particularly when they arise out of the same transaction; and that a cause of action *ex delicto* may be joined with one *ex contractu*, provided both arise out of the same transaction. *Grimshaw v. Woolfall*, 15 N. Y. Supp. 857, 40 St. Rep. 299; *Rothschild v. Grand Trunk Ry. Co.*, 30 St. Rep. 642, 10 N. Y. Supp. 36, subject to the rule that the claims must be consistent with each other; *Teale v. City of Syracuse*, 32 Hun, 332.

An action for injury to real property, and one for the rent of the real estate, may be united in the complaint as arising out of

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the same transaction. *Cochran v. Mannering*, 10 App. Div. 516, 41 N. Y. Supp. 1090.

An action by shippers against carriers, as well as their principals, for delivering goods in a damaged condition, does not show a misjoinder of causes of action, although there can be but a single satisfaction for the breach. *American Trading Co. v. Thomas Wilson, Sons & Co.*, 37 Misc. Rep. 76, 14 N. Y. Supp. 718.

In *Doyle v. American Wringer Co.*, 60 App. Div. 525, 72 N. Y. Supp. 1100, it was held that a cause of action for trespass and one for assault, arising out of the same transaction, might be properly united. To same effect, *Griffith v. Friendly*, 30 Misc. Rep. 393, 63 N. Y. Supp. 391.

In *Hay v. Hay*, 13 Hun, 315, joinder of cause of action for duress exercised over plaintiff's ancestor to make a will, and of cause of action based on false representations to plaintiff to induce him to waive objection to probate, was held proper.

Injuries to the person and property of plaintiff by the same wrongs are "claims arising out of the same transactions," which may be united in the same complaint. *Rosenberg v. Staten Island Ry. Co.*, 14 N. Y. Supp. 476, 38 St. Rep. 106.

A cause of action arising on contract and one arising on tort cannot be united in the same complaint. *Stanton v. Missouri Pac. Ry. Co.*, 15 Civ. Proc. 296. As upon a promissory note, and for assault and battery. *Dorman v. Kellam*, 14 How. Pr. 184, 4 Abb. 202.

A cause of action for penalties specified in subdivision 10 of section 484 is improperly united with a cause of action for injury to real property specified in subdivision 4, when it does not appear on the face of the complaint that the two causes of action arose out of the cutting of the same trees. *People v. Wells*, 52 App. Div. 583, 63 N. Y. Supp. 319.

In this case the provisions of the Code relative to joinder of causes is very fully considered and passed upon.

Distinct statutory penalties cannot be joined. *Motley v. Pratt*, 13 Misc. Rep. 758, 35 N. Y. Supp. 184.

In subdivision 2 of section 484, an action for a statutory penalty for excessive fare, and for personal injuries in ejecting plaintiff from the cars on a subsequent trip on the same day, cannot be united. *Sullivan v. N. Y., N. H. & H. R. R. Co.*, 1 Civ. Proc. 285, 61 How. Pr. 490.

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Causes of action against a landlord for not complying with terms of agreement, and for entering premises and removing plaintiff's property, cannot be joined. *Keep v. Kauffman*, 56 N. Y. 332.

Trespass and slander of title cannot be joined. *Dodge v. Colby*, 37 Hun, 515, 108 N. Y. 445.

Cause of action alleging plaintiff bet money with defendant upon the event of a horse race and lost it, and a cause of action that plaintiff was induced to make the bet by false representations respecting the horse that won the race, made by defendant and others with whom defendant conspired to defraud plaintiff, cannot be united, the first being on contract and the second on tort. It was held that, although arising out of the same transaction, they cannot be united because not belonging to either of the subdivisions specified in section 484. *Raynor v. Brennan*, 40 Hun, 60. This case does not seem to have been subsequently cited.

"The principle is well settled that an entire indivisible demand cannot be split up into several claims so as to make it a subject of two or more separate actions. \* \* \* It follows, as the result of this rule, that, where a claim arises upon a contract, or from a tort, the entire claim must be prosecuted in a single suit, and several suits cannot be brought for separate parts of such claim. Where several suits are brought, the pendency of the first may be pleaded in abatement of the other suit or suits, and a judgment in either will be a bar to a recovery in any other suit." *Nathans v. Hope*, 77 N. Y. 420, citing *Secor v. Sturgis*, 16 N. Y. 548.

In *Perry v. Dickerson*, 85 N. Y. 345, it was held that a judgment in an action to recover damages for alleged wrongful dismissal from defendant's employment before the expiration of the stipulated term was not a bar to a subsequent action to recover wages earned during the time plaintiff was actually employed, and which were due and payable before the wrongful dismissal; that the two claims constituted separate and independent causes of action upon which separate actions were maintainable.

The latter case was distinguished, upon the authority of *Nathan v. Hope*, *supra*, in *Reilly v. Sicilian Asphalt Paving Co.*, 14 App. Div. 242, 43 N. Y. Supp. 536, where it was held that where damage both to persons and property result from a single tortious act, it cannot be made the subject of two actions. This decision

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was followed by one in the same case, 31 App. Div. 302, 52 N. Y. Supp. 817, reversed 170 N. Y. 40, holding that an injury to the person and an injury to property, although resulting from the same tortious act, constitute different causes of action, and a judgment for damages to property recovered in one court and the satisfaction thereof is not a bar to the maintenance of an action in another court for the injury to the person arising from the same act, Cullen, J., in the opinion of the court, saying that the question before the court has been the subject of conflicting decisions in different jurisdictions.

This case is reported on first appeal to the Appellate Division February, 1897, in 4 N. Y. Annot. Cas. 209, and is followed by a note on "Separate actions for injuries to personal property from the same tort."

**SUBDIVISION 2.****Counterclaims Arising in Tort.**

Section 501, subdivision 1, provides that a counterclaim other than in contract must be a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

It is the policy of the law, even where the complaint is in tort, if the counterclaim interposed either arose out of the transaction, which is the foundation of the plaintiff's cause of action, or is connected with it, that the entire controversy should be wound up in one action. *O'Brien v. Dwyer*, 76 App. Div. 516, 78 N. Y. Supp. 600.

The theory of the Code is to authorize all causes of action, whether arising out of contracts or torts, to be litigated in the same action. *Smith v. Rowe*, 49 App. Div. 583, 64 N. Y. Supp. 389.

It is well settled by numerous authorities that in an action for tort no counterclaim can be allowed which does not arise out of the same transaction. *People v. Dennison*, 84 N. Y. 273, affirming 8 Abb. N. C. 129, affirming 59 How. 157; *Eckert v. Gallien*, 24 Misc. Rep. 485, 53 N. Y. Supp. 879.

In *McQueen v. New*, 87 Hun, 271, 33 N. Y. Supp. 395, it was held that counterclaims, in order to be interposed, must be of the character specified in section 501, and that where an action sounded in tort, the defendant cannot be allowed to interpose a counterclaim which did not arise out of the same transaction.

Where the complaint is in tort, the counterclaim may be properly

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set up where the plaintiff's cause of action and the matter set up in the counterclaim originated in the same transaction. *Numan v. Wolf*, 73 App. Div. 38, 76 N. Y. Supp. 371.

That a counterclaim arising out of the same transaction or contract as the tort sued upon may be properly set up is held in *Savage v. City of Buffalo*, 50 App. Div. 136 (138), 63 N. Y. Supp. 941; *Eckert v. Gallien*, 40 App. Div. 525, 58 N. Y. Supp. 85; *D'Auxy v. Dupre*, 47 App. Div. 51, 62 N. Y. Supp. 244.

In an action upon a promissory note damages for the conversion by the holder of property pledged to him as security for the payment of the note may properly be pleaded as a counterclaim, and the amount thereof must be taken into consideration in determining whether a judgment in such action is reviewable in the Court of Appeals. *Cass v. Higenbotam*, 100 N. Y. 248.

In *Glenn & Hall Mfg. Co. v. Hall*, 61 N. Y. 226 (235), Dwight, C., considers the provisions of the Code relative to counterclaim and discusses "What is a cause of action connected with the subject of the action" so as to authorize a counterclaim.

The right to interpose a counterclaim arising out of the same transaction, where the complaint is in tort, is considered and cases collated and discussed and distinguished in *Empire Feed Co. v. Chatham Nat. Bank*, 30 App. Div. 476, 58 N. Y. Supp. 387.

The first subdivision of section 501 of the Code does not limit the right of a defendant to interpose counterclaims to an action brought on contract, but gives a right to interpose counterclaims in an action brought to recover damages for the tort, if the causes of action set out in the complaint and in the answer arise out of the same contract or transaction, or relate to the same subject, nor does it direct that the cause of action set up as a counterclaim must arise out of a contract, but it authorizes the interposition of causes of action arising out of torts as counterclaims. In an action to recover damages for a tort, a counterclaim arising out of a contract connected with the subject of the action may be pleaded, and in an action on a contract, damages arising out of the tort of the plaintiff, if the two causes of action are connected may be interposed as a counterclaim. *Ter Kuyle v. Marlsan*, 81 Hun, 420, 31 N. Y. Supp. 5.

In an action to compel defendants to deliver to plaintiff certain bills of lading, a claim on the part of defendant for the value of the identical goods which are the subject of the action, is a cause

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of action arising out of the transaction set out in the complaint as the foundation of the plaintiff's claim; or is at least connected with the subject of the action and is a counterclaim. *Thompson v. Kessel*, 30 N. Y. 383.

In an action in the nature of trover by plaintiffs who had indorsed certain bills of exchange, brought to recover the value thereof from defendants in whose possession they were and who claimed title thereto through the plaintiff's indorsement, the defendants were held to be at liberty to set up as a counterclaim the liability of plaintiff as indorsers of the bills, and the right to recover against them as such indorsers. *Xenia Branch of State Bank of Ohio v. Lee*, 2 Bosw. 694.

Same rule was laid down in action to recover possession of personal property. *Brown v. Buckingham*, 21 How. 190.

In an action to recover damages for an alleged assault and battery, the defendant may, under section 501 of the Code, interpose as a counterclaim, an assault and battery committed upon him by the plaintiff during the affray out of which the plaintiff's cause of action arose. The word "transaction" used in subdivision 1 of that section includes torts. Where causes of action, one set out in the complaint and the other in the answer as a counterclaim, are so connected that they must be determined on the same evidence, they should be litigated and determined in one action, although a recovery cannot be had in favor of either party without a finding that would wholly defeat the other party's alleged cause of action. *Deagan v. Weeks*, 67 App. Div. 410.

Where it was alleged in the answer that defendant was induced to make a compromise and give a bond by the false and fraudulent representations of plaintiff made with intent to deceive him, and that, as a consequence of such fraud, the defendants sustained damages, it was held that the alleged cause of action of the defendant arose out of the transaction or contract of which the bond set forth in the complaint, as the foundation of plaintiff's claim, was the product, and the making of it constituted a bar, and such cause of action alleged by the defendant comes within the meaning of the counterclaim as defined by the statute. *Thomson v. Sanders*, 118 N. Y. 252.

In an action for conversion of a quantity of wood defendant set up as a counterclaim that he held a bond and mortgage as a collateral upon certain lands which were insufficient security, and the obligor was insolvent. The plaintiff, being second mortgagee in pos-

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session of these lands, with a knowledge of the facts and with intent to deprive defendant of the security thereon, wrongfully cut the wood in question from the land. That on foreclosure of defendant's mortgage and sale thereunder, a large deficiency remained. It was held that defendant's claim was connected with the subject of the action so as to constitute a proper counterclaim, the rule being that the counterclaim must have such a relation to the subject of the action that it will be just and equitable that both should be settled by one litigation, and that the claim of the defendant should be offset against or applied upon that of the plaintiff. *Carpenter v. Manhattan Life Ins. Co.*, 93 N. Y. 552.

In an action for rent defendant may set up a counterclaim for conversion of articles alleged to have been taken from the premises by plaintiff and wrongfully applied on the rent claimed — the two causes arise out of the same transaction. *Littman v. Coulter*, 7 N. Y. Supp. 1, 23 Abb. N. C. 60.

In an action to recover for sales made to defendant by plaintiff's assignors, a counterclaim that defendant was defrauded by plaintiff through said sales and others, in which plaintiff's assignors, in conspiracy with plaintiffs, one of whom acted as purchasing agent for defendant, overcharged defendant, is "connected with the subject of the action." *Siebrecht v. Siegel-Cooper Co.*, 38 App. Div. 549, 56 N. Y. Supp. 425.

In an action to recover a chattel, a claim for repairs made on it at the owner's request is sufficiently connected with the subject of the action. *Cooper v. Kipp*, 52 App. Div. 250, 65 N. Y. Supp. 379.

Where a tenant suffered constructive eviction by reason of the unhealthful condition of the premises, owing to which his family became ill, a claim for expense of moving, medical attendance, etc., arises out of the same transaction as is set forth in a complaint by the landlord in his complaint for rent accruing after the eviction and is a proper subject of counterclaim. *Ramoine v. Brewster*, 27 N. Y. Supp. 138, 68 St. Rep. 17.

In an action for construction of a will and to have the title of lands adjudged to be in plaintiff, defendant alleged as counterclaims that plaintiff had illegally and improperly collected rents arising out of the trust property in question and converted the same to his own use. This was held to constitute a valid counterclaim. *O'Brien v. Garniss*, 25 Hun, 446.

A counterclaim made for false representations in action for breach of covenant on exchange of real estate may be interposed.



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So also in an action for the price of stock. *Kingsland v. Haines*, 62 App. Div. 146, 70 N. Y. Supp. 873; *Delano v. Rice*, 21 Misc. Rep. 714, 48 N. Y. Supp. 130, affirmed in 23 App. Div. 327, 48 N. Y. Supp. 295. So also for usury and cloud of title in an action for foreclosure. *Queen City Bank v. Brown*, 75 Hun, 259, 26 N. Y. Supp. 1016; *Myers v. Wheeler*, 24 App. Div. 327, 48 N. Y. Supp. 611.

In an action to recover damages for the conversion of a promissory note made by plaintiff and also of certain collaterals, defendant may properly interpose a counterclaim setting up the note and its nonpayment at maturity, and asking to recover the amount due thereon with interest, although, after the note became due, plaintiff had tendered defendant the amount due, and demanded the note with the collaterals which the defendant refused to surrender. *Empire Feed Co. v. Chatham National Bank*, 30 App. Div. 476, 52 N. Y. Supp. 387.

The general rule undoubtedly is that in an action for conversion, a counterclaim disconnected with the cause of action is not allowable. *Empire Feed Co. v. Chatham National Bank*, 30 App. Div. 476, 52 N. Y. Supp. 387.

In an action sounding in tort defendant cannot be permitted to interpose a counterclaim unless it is within the provisions of section 501. *Davis v. Aikin*, 85 Hun, 554 (556), 33 N. Y. Supp. 103; *Rochester Distilling Co. v. O'Brien*, 72 Hun, 462, 25 N. Y. Supp. 281.

In *Briton v. Ferrin*, 171 N. Y. 235, it was held that the relation between a commission agent and his principal is fiduciary, and that the proceeds of sales made by the agent belong to the principal, who may reclaim them so long as their identity is not lost, subject to the right of the *bona fide* purchaser for value; that where, under such circumstances, the agent, upon demand, refuses to surrender such proceeds, he will not be permitted in an action by the principal to defeat or diminish a recovery therefor by producing a claim of a third person and interposing it as a counterclaim, for the reason, among others, that the action is one for tort and secures to the plaintiff the same rights and remedies that exist as to other wrongs of a similar character, the counterclaim not arising out of the same transaction.

In *Rothschild v. Whitman*, 132 N. Y. 472, plaintiffs brought an action for false imprisonment, a counterclaim was sought to be

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set up by way of a cause of action for damages caused by deceit in the purchase of goods on credit. Court held that while the deceit was the inducement to the action and duress, it arose out of neither because it preceded both and existed independently of both. That each was a separate and distinct wrong and transaction by itself.

In an action brought for the conversion of property by defendant after it had been stored with him, a demand for the value of storage is not a proper counterclaim. It does not arise in the same transaction as that from which the plaintiff's claim springs. *Schaefer v. Empire Lithographing Co.*, 28 App. Div. 469, 51 N. Y. Supp. 104.

In slander in charging plaintiff with stealing wood from defendant and being a thief, defendant set up that at the time referred to plaintiff was on defendant's premises removing wood therefrom without his consent; that he directed him to desist, whereupon plaintiff charged defendant with being a wood thief and stealing plaintiff's wood. That this was part of the same conversation upon which plaintiff based his cause of action and arose out of the same transaction. *Held*, that the slander so pleaded as counterclaim did not arise out of the transaction set out in the complaint. *Sheehan v. Pierce*, 53 St. Rep. 438, 23 N. Y. Supp. 1119.

Where plaintiff sued for articles put in defendant's store, and defendants by way of a set-off claimed that in putting in said articles plaintiff removed and appropriated other articles; it was held not to be a proper counterclaim. *Starr Cash Car Co. v. Reinhardt*, 2 Misc. Rep. 116, 20 N. Y. Supp. 872, 49 St. Rep. 228.

In *Marshall v. Cohen*, 11 Misc. Rep. 398, 32 N. Y. Supp. 283, it was held that in an action to foreclose a mechanic's lien, counterclaim for damages granted on false representations could not be interposed.

Where property was unlawfully withheld after demand and a counterclaim filed for storage, such counterclaim was held improperly pleaded. *Bernheimer v. Hartmayer*, 50 App. Div. 316, 63 N. Y. Supp. 978.

Plaintiff's complaint alleged that under color of a contract defendant fraudulently obtained money from plaintiff by means of misrepresentation; defendants set up as a counterclaim a balance due them from the plaintiff for work done under the

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contract. *Held*, that the cause of action set up as a counterclaim did not arise out of the transaction upon which plaintiff's claim was founded. *People of the State of New York v. Dennison*, 84 N. Y. 272.

A tenant in an action for rent may not set up a counterclaim for charges caused by alteration of the premises, made by the landlord. *Faber v. Phillips*, 26 Misc. Rep. 723, 56 N. Y. Supp. 1028. It was held that the counterclaim did not arise out of the contract or transaction set forth in the complaint and was not connected therewith.

In an action for trespass upon plaintiff's land and injury thereto, defendant alleged his right to use the premises as a highway and claimed damages for its obstruction by plaintiff. This was held not to arise out of the same transaction, and not connected with the subject of the action. *Hall v. Werney*, 18 App. Div. 565, 46 N. Y. Supp. 33.

In replevin against a volunteer taking charge of goods defendant cannot plead storage or money advanced to enable plaintiff to buy the goods, or due for labor thereon as counterclaims, because they do not arise from nor were connected with the subject of the action. *Lyungstrandh v. William Haaker Co.*, 16 Misc. Rep. 387, 38 N. Y. Supp. 129.

Where vendors brought replevin against the receiver of an insolvent corporation to recover certain goods alleged to have been obtained by the firm through fraud, and to have thus come into the hands of the receiver, a counterclaim alleging that the plaintiff did not seize the goods described in the requisition to him but took a distinct lot of goods which never belonged to plaintiffs, the vendors, is demurrable as the counterclaim does not arise out of the transaction set forth in the complaint. *Marshall v. Friend*, 35 Misc. Rep. 101.

Where, in an action of ejectment, plaintiff claimed title under a devise in a will by which a legacy was given to one of the defendants and made chargeable upon the real estate in question, it was held, that the legacy did not constitute a counterclaim, and that plaintiff was not required to demur to the answer setting it up as a counterclaim in order to raise the question, nor did he, by replying, waive his right to take the objection. *Dinan v. Coneys*, 143 N. Y. 544.

In *Caponigri v. Altieri*, 165 N. Y. 255, the court refused to

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consider a counterclaim upon appeal, where action was brought for penalty against bankers, on the ground that it could not be alleged for the first time on appeal.

**ARTICLE VII.**

**ENFORCEMENT OF REMEDIES IN ACTIONS FOR TORTS.**

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**SUBDIVISION 1.**

**Methods for Enforcement of Rights.**

The methods provided by law for the enforcement of rights in actions for torts are even more varied than the remedies by differing forms of action. There exists the remedy by attachment of goods, and arrest and bail, as provisional remedies for the protection of plaintiff before judgment.

In equitable actions to restrain torts, set aside fraudulent conveyances, or obtain equitable relief of any kind, the judgment is enforced in the usual manner by which a court of equity compels performance of its decrees. Code, § 1241. The enforcement of decrees in equity is an integral part of equity practice, and does not differ as to actions arising out of wrongful acts from the method by which the court, through process of contempt or other appropriate action, compels obedience to its decrees in all matters within its cognizance.

In replevin provision is made by section 1731 for form of execution for the delivery of chattels.

In common-law actions for tort, the procedure on enforcement of judgments is peculiar to that class of actions in so far as it authorizes the issuing of an execution against the person. An execution against the body can only be issued in actions sounding in tort, or in those cases where an order of arrest has previously been obtained. This class of cases is defined by section 549 of the Code as being one where the right to arrest depends upon the nature of the action, except in certain unimportant particulars provided for by section 550. The element of tort in some form

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must enter into the action in order to authorize an order of arrest which may be followed by an execution against the body.

The subjects of attachment, arrest, and execution against the person will alone be considered in this connection.

**SUBDIVISION 2.****Attachment.**

Upon plaintiff showing the existence of certain conditions which are set out in section 636 of the Code, such as that the defendant is a foreign corporation, nonresident, etc., a warrant of attachment may be granted in the three classes of cases under the provisions of section 635. The first class mentioned, "Breach of contract, express or implied, other than a contract to marry," we may exclude from consideration. Two classes of cases remain, namely, "Wrongful conversion of personal property" and "Injury to person or property in consequence of negligence, fraud, or other wrongful act."

Conversion is defined in *Pease v. Smith*, 61 N. Y. 477, to be an unauthorized act, which deprives another of his property permanently, or for an indefinite time. It is enough to constitute conversion that the wrongful owner has been deprived of his property by some unauthorized act of another assuming dominion or control over it.

In *Laverty v. Snethen*, 68 N. Y. 522, at 524, Church, Ch. J., cites the following definition by Savage, J., in *Spencer v. Blackman*, 9 Wend. 167, "A conversion seems to consist of any tortious act by which the defendant deprives the plaintiff of his goods." Judge Church also cites from Bouv. Law Dict., title Conversion, the statement that every unauthorized taking of personal property, and intermeddling with it beyond the extent of the authority conferred, in case a limited authority has been given, with intent so to apply and dispose of it, as to alter its condition, or interfere with the owner's dominion, is a conversion.

The terms "personal injury" and "injury to property" are defined by section 3343 of the Code, subdivisions 9 and 10. Personal injury as so defined includes libel, slander, criminal conversion, seduction, and malicious prosecution. Also assault and battery, false imprisonment, or other action, injury to the person either of the plaintiff or of another. An injury to property is defined as "An actionable act whereby the estate of another is

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lessened, other than a personal injury or the breach of a contract."

The consideration of the question as to when attachment will issue, and under what circumstances would lead to the examination of matters of procedure covered by the Code, and the decisions construing the sections relating to attachment, and no effort will be made to collate the authorities upon the subject. Attention is, however, called to the fact that in those cases where an attachment is authorized, and an action is brought for the tortious act, an attachment, like other provisional remedies, is not a matter of right, and rests in the discretion of the Supreme Court. *Sartwell v. Field*, 68 N. Y. 341 (342).

The remedy is held to be a severe one, and not to be sustained even when granted unless the proof fairly warrants it, and not to be resorted to for the purpose of obtaining an unconscionable advantage over a defendant. *McGrath v. Sayer*, 19 App. Div. 321, 46 N. Y. Supp. 113.

In *Penoyar v. Kelsey*, 150 N. Y. 77, Vann, J., in the opinion of the court, says (p. 80): "Owing to the statutory origin and harsh nature of this remedy, the section in question should be construed in accordance with the general rule applicable to statutes in derogation of the common law, strictly in favor of those against whom it may be employed." Citing *Thorpe v. Spier*, 4 Hill, 76 (86).

SUBDIVISION 3.

Arrest Pending the Action.

It is provided by section 548 of the Code, under the title relating to arrest pending an action and proceedings thereon, that a person shall not be arrested in a civil action or special proceeding, except as prescribed by statute. Sections 549 and 550 provide for and restrict the right to an order for arrest pending the action, while subsequent sections of the Code relative to execution define cases in which an execution will issue against the person.

Section 549 as to the first three subdivisions relates to arrest in action for torts. Subdivision 4 provides for an arrest in action upon contract in certain cases. In such cases, however, the plaintiff can only recover when he proves the fraud on the trial of the action. The Code, as it now stands, in that respect is the re-

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sult of various amendments, more particularly those of 1879 and 1886.

Section 549 relates to the right to arrest when dependent upon the nature of the action, while section 550 provides for an arrest when it depends wholly upon extrinsic facts, and is said in *Ensign v. Nelson*, 49 Hun, 215, 14 Civ. Proc. 438, 1 N. Y. Supp. 685, affirmed without opinion in 112 N. Y. 674, to be a substitute for the writ of *ne exeat*.

No extended citation of authorities as to the right to arrest will be entered upon in this connection, since the decisions relate almost without exception purely to matters of procedure which are applicable not only to actions for wrongs, as referred to in the first three subdivisions of section 549, but also to actions upon contract as provided for in the fourth subdivision.

Since the right to arrest is not, therefore, confined entirely to actions in tort, and in view of the fact that works upon procedure discuss the subject and collate the authorities very fully, no attempt will be made to enter upon a full consideration of the practice under these sections of the Code. The general rule is that a reasonably clear cause of action must appear to authorize an order of arrest, since if the plaintiff finally recovers, he will, as a matter of course, be entitled to a body execution, and where a doubtful and important question is involved, the order will be denied.

It is said in *Hathaway v. Johnson*, 55 N. Y. 93, that statutes authorizing arrest and imprisonment for debt, although remedial in that they are designed to coerce, by reason of the imprisonment, the payment of the debtor, are also regarded as penal, and are not to be extended by construction so as to embrace cases not clearly within them. Cited and followed in *Kessler v. Levy*, 11 Misc. Rep. 275, 32 N. Y. Supp. 260.

In *Moffatt v. Fulton*, 132 N. Y. 507, Vann, J., at p. 514, in opinion of the court, considers the amendment of 1886 to section 550, stating that it is a substitute for the writ of *ne exeat*, not by abolishing the right of arrest but by requiring the facts which theretofore had been stated in part outside the complaint, to be stated in it as a part of the cause of action. That it was clearly the intention of the legislature by this amendment to require a plaintiff intending to arrest a defendant to predicate his action upon some ground of wrongdoing mentioned in the statute, as a substantive

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part of the cause of action, so that he could defend himself before a jury and recover costs if such defense was successful. This amendment changed the nature of certain causes of action somewhat by requiring facts to be alleged and proved in addition to those previously required to be alleged and proved in order to recover.

The provisions of the Code relative to order of arrest and compliance therewith, so far, at least, as subdivision 4 of section 549 is concerned, are important in view of the provisions of section 1487 of the Code, which require, in cases other than where the plaintiff's right to arrest depends upon the nature of the action, that an order of arrest should have been granted and executed, and if executed should not have been vacated.

**SUBDIVISION 4.**

**Execution against the Person.**

Execution against the body lay at common law only in actions of trespass *vi et armis*, but has since been given in other actions by a variety of statutes. It is now granted only upon allegations of fraud and concealment of property in contracts and in torts. Herrman on Executions, § 367.

It is only when the judgment cannot be supported except by proof of facts warranting the arrest of the defendant that an execution cannot issue against his person unless an order for his arrest was issued and executed before judgment, and remains unsatisfied. Freeman on Executions, § 453, citing 159 N. Y. 50.

The provisions with regard to the enforcement of judgment by execution against the person will be found under different sections in widely different parts of the Code. The general provisions with regard to the enforcement of a judgment by execution are contained in section 1240, where it is provided that a final judgment may be so enforced, where it is for a sum of money, in an action of ejectment, or for dower, or in an action to recover a chattel. By section 1241 certain other judgments may be enforced by punishment for disobedience to their requirements by process for contempt.

The kinds of execution which may be issued under section 1240 are enumerated in section 1364, one of them being an execution against the person, the others executions against property.



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By sections 1487 and 1488 the right to issue execution against the person is defined and limited, referring back to section 1240 in terms. Execution may be issued under section 1487, where the plaintiff's right to arrest the defendant depends upon the nature of the action (see § 549), or in any other case where an order of arrest has been granted and executed in the action (see § 550), if it was executed against the judgment debtor, and has not been vacated, subject to the provisions of section 1488, that the execution cannot be issued against the person of a woman, unless under the exceptions therein provided.

Thus the right to issue execution against the person, where the preliminary requisites hereinbefore set forth have been complied with, exists in two classes of cases, namely: *First*. Dependent upon the nature of the action; or, *Second*. That an order of arrest has been granted where, from the nature of the action, an execution could not otherwise issue.

This subject is very fully considered in *Moffatt v. Fulton*, 132 N. Y. 507, and *Sherman v. Grinnell*, 159 N. Y. 50, where the effect of the amendment to sections 549 and 550 in 1886 is commented upon and decided. The effect of that amendment is to render numerous previous authorities inapplicable by reason of the transfer of a portion of section 550 to section 549. 132 N. Y. 507, *supra*, is cited and followed in *Steamship Richmond Hill Co. v. Seager*, 31 App. Div. 288, 52 N. Y. Supp. 985; appeal dismissed in 159 N. Y. 574. The scope of section 549 and the right of arrest on execution under section 1487 are considered in opinion by Martin, J., in *Britton v. Ferrin*, 171 N. Y. 235 (243).

It is said in *Lehman v. Mayer*, 68 App. Div. 12 (14), 74 N. Y. Supp. 194, that the cases in which plaintiff's right to arrest the defendant depends upon the nature of the action, are specified by section 549, citing cases *supra*. Same rule is held in *Segelke v. Finan*, 22 Abb. N. C. 459, 15 Civ. Proc. 417, 1 N. Y. Supp. 381. See also *Roeber v. Dawson*, 22 Abb. N. C. 73 (79), 3 N. Y. Supp. 122; *Bussey-McLeod Stove Co. v. Wilkins*, 1 App. Div. 154, 36 N. Y. Supp. 977.

By section 1372 the "requisites of execution against the person" are given, which it is said must require the sheriff to arrest the judgment debtor and commit him to the county jail until he pays the judgment or is discharged by law.

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By sections 1489 and 1490 it is provided that except in certain contingencies therein set forth, an execution against the person cannot be issued until an execution against property has been returned wholly or partly unsatisfied.

Execution against the property must be issued and returned before issuing execution against the person. *Bergman v. Noble*, 45 Hun, 133; *Noe v. Cristie*, 46 How. 496.

By section 1494 the effect of such imprisonment, when discharged at the request of the creditor, is to prevent issue of another execution against the person.

The imprisonment of a person upon execution in a civil action no longer constitutes a satisfaction of the judgment except during the continuance of the imprisonment. *Hoyle v. McCrea*, 42 App. Div. 313, 59 N. Y. Supp. 200, citing Code, § 1491; *Koenig v. Staeckel*, 58 N. Y. 475; *Flack v. State of New York*, 95 N. Y. 461, and Code, § 2213.

SUBDIVISION 5.

Discharge from Imprisonment.

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§ 1. **Under section 572 of the Code.**—Under section 572 of the Code, a defendant charged under execution may be discharged from imprisonment, by reason of the delay of the plaintiff in the trial of the action, or neglect to enter judgment, or issue execution against the person of the defendant, as therein provided.

It is said in *Sweet v. Norris*, 12 Civ. Proc. 175, that the limitations of time prescribed under section 572 "are to prevent a plaintiff, having a defendant in actual or constructive imprisonment under an order of arrest, from continuing his imprisonment indefinitely by delaying the entry of his judgment or by delaying to issue his execution. Before the amendment to this section, plaintiffs sometimes omitted to enter their judgments or to issue their executions for a long period, and thus held the defendants in actual or constructive imprisonment under such order, and it was for the purpose of preventing this abuse that this section was amended."

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Section 572 is only applicable in an action in which an order of arrest has been issued.

This case was affirmed by the General Term, in Fourth Department, September 20, 1877, as appears by memoranda in the Court of Appeals, affirming the General Term decision without opinion, 110 N. Y. 668, cited together with *Redner v. Jewett*, 54 St. Rep. 774, 25 N. Y. Supp. 273, in *Kreiser v. Scofield*, 10 Misc. Rep. 350, 31 N. Y. Supp. 23.

The section in question was intended to relieve from arrest, under orders of arrest, any cases in which the diligence required by statute was not used by the plaintiff in charging the defendant by execution. It has no application to executions, except in respect to such as may be issued where the defendant has been discharged pursuant to the provisions of such sections, and the word "mandate" referred to in such sections is the order of arrest mentioned in the beginning thereof. *Hedges v. Payne*, 85 Hun, 377, 32 N. Y. Supp. 968, affirmed, on opinion below, in 146 N. Y. 397.

An execution against a person, although not issued within three months after the entry of judgment, is not void under section 572, and in case it is so issued the defendant's remedy is by an application to the court for his discharge from imprisonment, or to be relieved from imprisonment under the mandate on which application plaintiff has the right to show a reasonable cause why the application should be granted. *Steamship Richmond Hill Co. v. Seager*, 31 App. Div. 288, 52 N. Y. Supp. 985; appeal dismissed in 159 N. Y. 574.

Section 572 of the Code providing that where defendant was discharged from arrest for failure to take out an execution, he shall not be arrested upon the execution issued on the judgment does not apply to municipal courts. *Rogow v. Clark*, 40 Misc. Rep. 208, 81 N. Y. Supp. 682.

**§ 2. Under section 111 of the Code.**—Under section 111 of the Code it is the duty of the sheriff, where a person has been held in custody for more than three months under an execution or other mandate against the person, to enforce the recovery of less than \$500, or for a fine for contempt of court for nonpayment of alimony after the expiration of three months to discharge him from custody; and in case the amount for the payment of which the defendant is imprisoned is \$500, or over, the imprisonment shall not continue for a longer period than six months.

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Section 111, as amended in 1886, limiting the time of imprisonment, "upon any execution or other mandate against the person," refers only to the final process or mandate under an adjudication fixing the amount due. It does not include orders of arrest issued at the time of the commencement of the action or before any recovery. *Levy v. Salomon*, 105 N. Y. 539. To same effect, *Matter of Shepard*, 43 Hun, 287.

In computing the term of six months to imprisonment by which section 111 is limited, under a commitment imposed for contempt of court in the nonpayment of alimony in a divorce case, the time during which the person against whom the process runs is out of jail in the custody of his counsel pending *habeas corpus* proceedings, is not to be included. Actual detention within the prison walls of a jail within six months is what this provision of the Code contemplates in case of a commitment for contempt of court. In such a case no merely constructive restraint can be taken into account. *People ex rel. Clark v. Grant*, 47 Hun, 604, affirmed in 111 N. Y. 584.

Section 111 does not, where a husband has served three months in prison under a commitment for contempt of court in failing to pay alimony *pendente lite* awarded against him, preclude the court from again committing him to prison upon his failure to pay alimony and counsel fees awarded against him by the final judgment entered in the action. *Reese v. Reese*, 46 App. Div. 156, 61 N. Y. Supp. 760.

§ 3. **Discharge under sections 2188 to 2199, 2200 to 2218.**—Very elaborate provision is made by the Code by two apparently distinct remedies, sections 2188 to 2218, inclusive, for the discharge of a person imprisoned on execution against the person. Article 2 of title 1 of the Code, including sections 2188 to 2199, is entitled "Exemption from Arrest or Discharge from Imprisonment of an Insolvent Debtor." Article 3 of the same title, sections 2200 to 2218, inclusive, is entitled "Discharge of an Imprisoned Judgment Debtor from Imprisonment."

It is said in *Matter of Brady*, 69 N. Y. 215, affirming 8 Hun, 437, that the sole object of the statute is the discharge of honest debtors, who make an honest and full surrender of all their property to their creditors. The scope of this provision is considered in *In re Caamano*, 8 Civ. Proc. 29, following *Sudam v. Belknap*, 20 Hun, 87, and citing and distinguishing *In re Brady*, 69 N. Y.

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215, the latter case holding that a judgment debtor imprisoned on execution, who has disposed of his property with intent to defraud the creditor at whose suit he is imprisoned, is not entitled to his discharge under the provisions of the Revised Statutes in relation to voluntary assignments by debtors so imprisoned.

Section 2202 of the Code may well be considered in connection with section 111 heretofore referred to. The procedure, as under these provisions, together with forms and citations of authorities, is fully given in Fiero on Special Proceedings, 468 *et seq.*

## ARTICLE VIII.

### EFFECT OF DISCHARGE IN BANKRUPTCY.

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#### SUBDIVISION 1.

##### Provisions of State and Federal Statutes.

The Code of Civil Procedure, § 1268, provides that at any time after one year has elapsed since a bankrupt was discharged, he may apply to the court in which judgment was rendered against him for an order directing that the judgment be canceled and discharged of record.

The Bankruptcy Law of 1867 (R. S., § 5117) excepted from discharge only fraudulent debts and fiduciary debts. The present law, section 17, provides as follows:

“§ 17. *Debts not affected by a discharge.*—A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as \* \* \* (2) are *liabilities* for obtaining property by false pretenses or false representations or for willful and malicious injuries to the person or property of another, *or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation;* \* \* \* or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.”

The section as it stands above was so amended in 1903, and the amendments are shown in italics.

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This section, as originally passed, was, as to the portion above cited, previous to the amendment, as follows:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as \* \* \* (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; \* \* \* or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

It is said in *Collier on Bankruptcy* (4th ed.), p. 191, that section 17, section 14, on "Discharges," and section 63, on "Provable Debts," should be read together. That author further says that it is immaterial under the present act whether the debt was proved in bankruptcy; if it could have been proved the debt would be discharged. But the present law contains no provision that the proving of the debt shall constitute a waiver of other remedies, and the creditor loses no remedy by proving the debt, and, unless a discharge is granted and pleaded, a subsequent suit can be maintained. (Citing authorities.)

This view is sustained by *Frey v. Torrey*, 70 App. Div. 166, holding that: "Proof in the bankruptcy proceedings of an indebtedness created by the fraud of the bankrupt does not constitute an election which will estop the creditor from subsequently bringing an action against the bankrupt to recover the indebtedness created." (Affirmed July 9, 1903 (175 N. Y.) on opinion below.)

*Collier* (4th ed.), p. 194, construes the present provision of the statute as follows: "Under previous laws, liabilities for torts were not discharged unless in judgment, and this though liquidation was not essential to bring a debt within the excepted classes. It is surely still the law where the wrongs relied on are within the terms of subdivision of section 17 (see *Hun v. Cary*, 82 N. Y. 65). When, however, the tort grows out of or is the result of consent or a contract, on broad principles and irrespective of the amendment, it will, it is thought, even if not in judgment, be discharged."

#### SUBDIVISION 2.

##### Decisions under Bankruptcy Law of 1867.

In *Sheldon v. Clews*, 13 Abb. N. C. 41, it was held that the act of a bankrupt in receiving money for his customers' account, knowing his own insolvency, and failing to disclose the fact, with the

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intent to defraud the customer, is an active, express fraud within the meaning of the Bankruptcy Act of 1867, and is not discharged by a discharge in bankruptcy.

So, if a buyer who is insolvent conceals his insolvency to obtain goods, intending not to pay for them, this is a fraud upon the seller, and the claim is not discharged in bankruptcy. *Reed v. Martin*, 4 Hun, 590; *Thomas v. Snyder*, 27 Hun, 665, 60 St. Rep. 415; *Argyle v. Jacobs*, 87 N. Y. 110, affirming 21 Hun, 114.

The term "fraud" as used in section 5117 means active, express fraud, and not any implied from an illegal or unjustifiable act. *Hennequin v. Clews*, 77 N. Y. 427; *Bergan v. Patterson*, 24 Hun, 250.

The liability of trustees of a savings bank for mismanagement of its funds is not affected by discharge in bankruptcy. *Hun v. Carey*, 82 N. Y. 65.

A discharge does not affect an action for damages for forcible expulsion of a party from his place of business although such party has a claim for damages for trespass or conversion of his property at the time of the expulsion. *Newman v. Goddard*, 20 Hun, 563.

A discharge bars a claim for conversion which does not amount to a positive and intentional fraud. *Rowe v. Guilleaume*, 18 Hun, 556.

An unauthorized sale by a broker of stock purchased by him for a customer, although conversion, does not in itself constitute such a fraud as is contemplated by the Bankruptcy Act. Nor does the insolvency of the broker at the time of the conversion conclusively show fraudulent intent. *Stratford v. Jones*, 97 N. Y. 586.

An action for the conversion of securities pledged to a defendant as collateral security for a loan is barred by defendant's discharge in bankruptcy. *Hennequin v. Clews*, 77 N. Y. 427.

A conversion is not "fraud" within the meaning of that word as used in the provisions of the Bankruptcy Act. The fraud intended by the law is positive fraud, or fraud in fact, as distinguished from constructive fraud, founded upon some breach of duty.

In *Bradner v. Strang*, 89 N. Y. 299, at p. 306, Earl, J., says, that a claim for damages on account of fraud committed is not discharged by bankruptcy proceedings. That debts only are provable in bankruptcy, and, therefore, only can be discharged in bank-

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ruptcy. That a claim for damages, such as for libel, slander, assault and battery, is not discharged; distinguishing *Hennequin v. Clews*, 77 N. Y. 429; *Neil v. Clark*, 95 U. S. 704.

The "fiduciary capacity" in the provision of the Bankrupt Act, which excludes from the protection of a discharge debts contracted in that capacity, relates to cases of technical trust, not to such as are implied by the contract between principal and agent, and the "fraud" intended by the same provision is an active or express fraud, as distinguished from an implied or constructive one. *Palmer v. Hussey*, 87 N. Y. 303.

The same rule is also held in *Lawrence v. Harrington*, 122 N. Y. 408, 412, distinguishing *Bradner v. Strang*, 89 N. Y. 299, 114 U. S. 555.

A judgment recovered on an indebtedness incurred by a defendant because of failure to pay over rents collected by him as agent is barred by his discharge in bankruptcy. The provisions of the Bankruptcy Act with regard to debts created "while acting in a fiduciary capacity" do not apply to cases of implied, but only to those technical trusts which are actual trusts constituted by the parties.

In an action against several partners, to recover for goods furnished to the firm, alleged to have been obtained by false and fraudulent representations, it is enough, where the defense of a discharge in bankruptcy is interposed, to prove that one of the partners was guilty of the fraud; and such evidence will justify the recovery of a judgment against him and his innocent copartners. *Schroeder v. Frey*, 60 Hun, 58.

### **SUBDIVISION 3.**

#### **Decisions under Present Bankruptcy Act.**

The amendment of 1903 referred to in subdivision 1, where the statute is cited as it stood before and since that amendment, renders some of the decisions construing the section in question obsolete and unnecessary by reason of embodying, by way of amendment, the result of the decisions. By the omission of the word "fraud," and substitution of the word "liabilities" other decisions may be superseded or otherwise affected.

In *Colwell v. Tinker*, 65 App. Div. 217, 72 N. Y. Supp. 505, affirmed 169 N. Y. 531, it was held that the application under section 1268 of the Code of Civil Procedure for cancellation of a



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judgment recovered in an action for criminal conversation was properly denied, as plaintiff was not released by discharge in bankruptcy.

The liability of a husband for alimony decreed to be paid to his divorced wife was held, in *Massner v. Massner*, 62 App. Div. 286, 70 N. Y. Supp. 1107, not to be affected by discharge in bankruptcy. The same rule with regard to a bankrupt's liability for alimony, whether created at the time of the filing of the petition, or created thereafter. *Young v. Young*, 35 Misc. Rep. 335, 71 N. Y. Supp. 944.

In *Dissler v. McAulay*, 25 Misc. Rep. 411, it was held that a judgment against a bankrupt for breach of promise of marriage, in an action in which seduction and birth of child were proven, were not canceled by discharge in bankruptcy; reversed in 66 App. Div. 42, 73 N. Y. Supp. 270, on the ground that a female who has been seduced cannot maintain an action to recover damages therefor. (See § 17 as it now stands.) In *Finnegan v. Hall*, 35 Misc. Rep. 773, it was held that a judgment for breach of promise of marriage, where there was no proof of seduction, malice, or any injury to character, is a merely contract debt, and not one "for willful and malicious injury to person" within the provisions of section 17 of the Bankruptcy Act, and is released by a discharge under that act.

A complaint by a grantee of land to recover the price from the grantor because she was induced to withhold her deed from being recorded, the grantor conveying the same property to another person, does not charge fraud, and a judgment recovered thereon is not a judgment in an action for fraud" which is not released by discharge. *Collins v. Walter*, 35 Misc. Rep. 648, 72 N. Y. Supp. 203.

Where the complaint charged wrongful misappropriation and embezzlement of certain money, and averred the ownership of the plaintiff, demand therefor and a refusal, a discharge in bankruptcy is properly pleaded as a defense in an action for conversion, although not effective as against a cause of action for embezzlement. *Watertown Carriage Co. v. Hall*, 66 App. Div. 84, 72 N. Y. Supp. 466.

A judgment against a bankrupt for converted money received by him for sales on commission is released by discharge. *Matter of Benedict*, 35 Misc. Rep. 230.

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A private banker, knowing himself to be insolvent, who accepts trust moneys was held, under the circumstances, to be guilty of fraud and not discharged from liability by a discharge in bankruptcy. *Colmer v. Torrey*, 38 Misc. Rep. 127. The court held that by accepting the deposits under the circumstances disclosed the defendant was guilty of fraud.

Subdivision 2 of section 17 of the National Bankruptcy Law of 1898, which excepts from the operation of a discharge in bankruptcy "judgments in actions for frauds, or obtaining property by false pretenses or false representations," does not limit the exception to judgment recovered in common-law actions of fraud or deceit, but extends such exception to a money judgment, recovered in an action brought against the bankrupt to secure the specific performance of a contract, or to recover damages for its nonperformance, the gist and gravamen of which action, and the ground upon which the court retained jurisdiction thereof in order to award damages, after it had been shown that the bankrupt was unable to specifically perform the contract, was that the bankrupt had been guilty of actual fraud. *Matter of Bullis*, 68 App. Div. 508, affirmed 171 N. Y. 689.

In *Matter of Bullis*, 68 App. Div. 508, affirmed 171 N. Y. 689, and *Frey v. Torrey*, 70 App. Div. 166, affirmed 175 N. Y., in Memoranda without opinion, the construction of subdivision 4 of section 17 is considered, and it is held that the words "while acting as an officer in any fiduciary capacity" in the sentence reading "created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in a fiduciary capacity" do not qualify the words "fraud, embezzlement, or misappropriation," but only the word "defalcation," collating and discussing authorities.

## CHAPTER VII.

### DAMAGES.

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### ARTICLE I.

#### GENERAL RULES.

“ In cases of tort, the primary question of liability may itself depend, and it often does, on the nearness or remoteness of the harm complained of. Except where we have an absolute duty and an act which manifestly violates it, no clear line can be drawn between the rule of liability and the rule of compensation. The measure of damages, a matter appearing at first sight to belong to the law of remedies more than of ‘ antecedent rights,’ constantly involves, in the field of torts, points that are in truth of the very substance of the law.” Webb’s Pollock on Torts, 31, 32.

The term “ damages ” is said (Am. & Eng. Encyc. of Law [2d ed.], vol. 8, p. 541) to be defined by the Century Dictionary as “ the value in money of what is lost or withheld; the estimated money equivalent for detriment or injury sustained; that which is given or adjudged to repair a loss.”

Bouvier’s Law Dictionary defines damages as a “ pecuniary compensation or indemnity which may be recovered in the courts

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by any person who has suffered loss, detriment, or injury, whether to his person, property or rights, through the unlawful act or omission or negligence of another."

Still another definition is, "a sum of money found as compensation for an injury done the successful party as against a party doing the injury."

Underhill, p. 96, citing Mayne on Damages, says that the principles governing the measure of damages in actions for tort are very loose, and that there are many cases in which no measure can be given; but that, aside from circumstances of aggravation or mitigation, the compensation to be awarded in respect to the injury to property can be much more correctly calculated than in respect to injury to person and reputation.

The injured party is restricted in the recovery of damages for torts, not intentionally committed, and breaches of contract, to such as result, naturally and necessarily, from the act complained of. This is a rule of general application, including all cases, except those in which, for great ends of public justice, punitive damages may also be awarded and added. *The People v. The Mayor, Aldermen, etc., of the City of Albany*, 5 Lans. 524 (529), citing *Crain v. Petrie*, 6 Hill, 522; *Hamilton v. McPherson*, 28 N. Y. 72; *Passinger v. Thorburn*, 34 N. Y. 634; *Ryan v. N. Y. C. & H. R. R. Co.*, 35 N. Y. 210; *Railroad Co. v. Reeves*, 10 Wall. 176; *Pennsylvania R. R. Co. v. Kerr*, 68 Pa. 353; 2 Greenl. Ev. (5th ed.), § 256.

It is a general rule that, whenever one owes another a duty, whether such duty be imposed by voluntary contract or by statute, a breach of such duty causing damage gives a cause of action. Duty and right are correlative; and where a duty is imposed, there must be a right to have it performed. When a statute imposes a duty upon a public officer, it is well settled that any person having a special interest in the performance thereof may sue for a breach thereof causing him damage, and the same is true of a duty imposed by statute upon any citizen (*Cooley on Torts*, 654; *Hover v. Barkhoff*, 44 N. Y. 113; *Jetter v. N. Y. C. & H. R. R. Co.*, 2 Abb. Ct. App. Dec. 458; *Heeney v. Sprague*, 11 R. I. 456; *Couch v. Steele*, 3 Ell. & Bl. 402). *Willy v. Mulledy*, 78 N. Y. 306 (314).

It is said in *Ehrgot v. Mayor*, 96 N. Y. 264, 281, that the wrongdoer is responsible for the natural and proximate consequences

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of his misconduct, and what are such consequences must generally be left for the determination of the jury. Citing *Milwaukee & St. Paul R. R. Co. v. Kellogg*, 94 U. S. 469.

The rule in action for torts is that a party is entitled to recover such damages as are the direct consequences of the acts of the defendants, and those acting under their direction and by their authority. *Eten v. Luyster*, 60 N. Y. 252 (259).

Bartlett, J., in *Reisert v. City of New York*, 174 N. Y. 196, at 207, collates the authorities upon question of damages applicable to the case then at bar, stating that the rule as applied to contracts is equally applicable to a trespass. The general proposition laid down is that a party shall recover all the damage which has been occasioned by the breach of the contract by the other party, modified in two respects. First, the damages must flow directly and naturally from the breach of the contract. Second, they must be certain, both in their nature and in respect of the cause from which they proceeded. Speculative, contingent, and remote damages, which cannot be directly traced to the breach complained of, are excluded, and such damages only are allowed as the parties may fairly be supposed, when they made the contract, to have contemplated as naturally following its violation.

The rule of damages in civil actions does not depend upon the form of the action. Whether it be in contract or tort, the proper measure of damages, except where punitive damages are allowable, is a just indemnity to the party injured, for the loss which is the natural, reasonable, and proximate result of the wrongful act complained of, and which a proper degree of prudence, on the part of the complainant, would not have averted. *Baker v. Drake*, 53 N. Y. 211.

Whether the action sounds in tort or is based upon contract, the rule of damages is the same. *Scott v. Rogers*, 31 N. Y. 676; *Baker v. Drake*, 53 N. Y. 211, cited in *Wright v. Bank of Metropolis*, 110 N. Y. 237 (246).

It is clear, and so it has been held in many cases, that the rule of damages should not depend upon the form of the action. In all civil actions the law gives, or endeavors to give, a just indemnity for the wrong which has been done the plaintiff, and whether the act was of the kind designated as a tort or one consisting of a breach of a contract is, on the question of damages, an irrelevant inquiry. As was said by Rapallo, J., in *Baker v. Drake*, 53 N. Y.

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211, 220, the inquiry is, what is an adequate indemnity to the party injured, and the answer cannot be affected by the form of the action in which he seeks his remedy. In special cases, where punitive or exemplary damages are allowed, an exception exists to the general rule of indemnity. *Swain v. Schieffelin*, 134 N. Y. 471, 474. It is a mistake, therefore, to say that liability for breach of covenant is less extensive than for that of tort, if cases of tort be excluded in which punitive damages are allowed. *United States Trust Co. v. O'Brien*, 143 N. Y. 284 (288).

The rule of damages in civil actions, in contract or tort, except in cases where punitive damages are awarded, is a just indemnity for the wrong which has been done, and no more, and the true test by which this is to be determined is the amount of the injury which the plaintiff has sustained. *Thayer v. Manley*, 73 N. Y. 305 (307).

In all civil actions the law gives, or endeavors to give, a just indemnity for the wrong which has been done the plaintiff, whether the act was a tort or breach of contract. *United States Trust Co. v. O'Brien*, 143 N. Y. 284 (287).

The party who suffers from a breach of contract must so act as to make his damages as small as he reasonably can. He must not, by inattention, want of care, or inexcusable negligence, permit his damage to grow and then charge it to the other party. The law gives him all the redress which he should have by indemnifying him for the damage which he necessarily sustains. *Parsons v. Sutton*, 66 N. Y. 92; *Hogel v. N. Y. C. & H. R. R. Co.*, 28 Hun, 363.

A party seeking to recover damages must do nothing to enhance the damage, and do all that he reasonably can to diminish them. But he is not bound to incur any hazard or assume any unusual risks for that purpose. *Roberts v. White*, 73 N. Y. 375 (380), citing *Parsons v. Sutton*, 66 N. Y. 98; *Dillon v. Anderson*, 43 N. Y. 231; *Hamilton v. McPherson*, 28 N. Y. 72.

The question of proximate and remote damages is considered in *Milton v. Hudson Steamboat Co.*, 37 N. Y. 210 (214), citing numerous authorities. It is held that no damages can be recovered which could be avoided by the reasonable exertions of the party injured, and that if such damages are enhanced by such negligence or willfulness, the increased loss justly falls on him.

The law imposes upon a party the active duty of making rea-

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 Art. 2. Interest as Damages.
 

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sonable exertions to render injury as light as possible, and if the injured party, through negligence or willfulness, allows the damages to be unnecessarily enhanced, the increased loss justly falls upon him. *Hamilton v. McPherson*, 28 N. Y. 72.

The general rule for determining the amount of damages recoverable for the violation of a contract, or the breach of the duty, is that the injured party is entitled to such as are the natural, and to be apprehended, direct, and immediate results of the breach. This rule is subject to the qualification that if the person injured thereafter negligently suffers his loss to be enhanced, the increase so occasioned cannot be recovered from the person who first violated his contract or duty, and in some cases it is incumbent upon the person damnified to take such active measures as he reasonably may to minimize the damages naturally flowing from the breach. *Allen v. McConihe*, 124 N. Y. 342, 347.

It is the duty, as well as the right, of a person whose property is injured by the negligence of another to do what he reasonably can to save and protect it. He cannot stand still and omit such care as he can reasonably and prudently take, and thus suffer any loss, and cast it upon another. *Rexter v. Starin*, 73 N. Y. 601.

But a party is not bound to use unusual or extraordinary means to prevent injury. *Bevier v. President D. & H. C. Co.*, 13 Hun, 254.

## ARTICLE II.

### INTEREST AS DAMAGES.

Sedgwick on Damages (§ 320), says: There is no general principle which prevents the recovery of interest in actions of tort. The fact that the demand is unliquidated is insufficient to exclude interest, and there is nothing in the mere form of the action which renders it unreasonable that interest should be given. Nevertheless it is in the region of tort that we find the clearest cases for the disallowance of interest.

It is not allowed in such actions as assault and battery or for personal injury by negligence, libel, slander, seduction, false imprisonment. But where the tort is of a sort to deprive the plaintiff of property, though not (as in the case of conversion) taking away his title to any specific thing, interest is frequently and perhaps generally allowed. Thus, where the value of the property is diminished by an injury wrongfully inflicted, it has been held that

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the jury may give interest on the amount by which the value was diminished from the time of the injury. (*Walrath v. Redfield*, 18 N. Y. 457. But in *Black v. Camden & A. R. R. & Tr. Co.*, 45 Barb. 40, interest in such a case was said to be in the discretion of the jury.) So interest has been allowed on the money spent in repairing property injured (*Whitehall Tr. Co. v. New Jersey St. B. Co.*, 51 N. Y. 369) or in repurchasing property wrongfully taken and sold by the defendant.

Sutherland on Damages considers this question and cites authorities at section 355.

It is said in opinion of O'Brien, J., *Wilson v. City of Troy*, 135 N. Y. 96 (104), that the principle that the right to interest in trover and trespass was in the discretion of the jury, has been gradually abandoned, and that the rule now is that plaintiff is entitled to interest on the value of the property converted or lost to the owner by a trespass, as matter of law; that the rule is now settled in this State that when the value of property is diminished by an injury wrongfully inflicted the jury may in their discretion give interest on the amount by which the value is diminished from the time of the injury. It is further held that there is a class of actions sounding in tort, such as assault and battery, slander and libel, seduction, false imprisonment, etc., in which interest is not allowable at all. There is another class in which the law gives interest as part of the loss, such as trover, trespass, replevin, etc. And still a third class in which interest cannot be recovered as of right, but may be allowed in the discretion of the jury, according to the circumstances of the case. Distinguishing *Sayre v. State*, 123 N. Y. 291. The principal authority discusses the ground for allowance of interest in actions for tort, and the application of the rule to that class of cases.

In *Mairs v. Manhattan Real Estate Assn.*, 89 N. Y. 498, which was an action to recover for injury to property, it was held that the trial judge properly submitted to the jury the question whether the allowance of interest was necessary to give the plaintiff compensation.

*Duryee v. Mayor*, 96 N. Y. 477, holds that it is well settled that in such an action to recover even unliquidated damages, the allowance of interest by way of damages is in the discretion of the jury.

The authorities just cited were collated and commented upon in



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*Mansfield v. N. Y. C. & H. R. R. Co.*, opinion of Bradley, J., 114 N. Y. 331, to the point that the question of interest in such cases is for the jury. Numerous other authorities as to the allowance of interest are cited, commented upon, and distinguished, holding that *Mansfield v. N. Y. C., etc., Co.*, 102 N. Y. 205, was controlling in that particular case against the allowance of interest, upon the ground that the claim was unliquidated and uncertain in amount, as well as speculative and for prospective profits.

In *Brush v. Long Island R. R. Co.*, 10 App. Div. 535 at 540, 42 N. Y. Supp. 103, affirmed without opinion in 158 N. Y. 742, it is said that the rule in actions for tort to recover unliquidated damages is that the jury may award interest in their discretion, but are not bound to do so, citing 96 N. Y. 477, 114 N. Y. 331, *supra*.

In *Jamieson v. N. Y. & Rockaway Beach Co.*, 11 App. Div. 50 (54), 42 N. Y. Supp. 915, the same rule is laid down, citing the same authorities. The judgment in this case was affirmed on opinion below in 162 N. Y. 630.

It was held in the earlier cases that interest by way of damages in cases of torts was always in the discretion of the court. *Law v. Jackson*, 2 Wend. 209.

In *Hyde v. Stone*, 7 Wend. 354, it was said that interest might be given by way of damages in trover.

And in *Baker v. Wheeler*, 8 Wend. 505, that the rule of damages in an action of trover was a question of law not to be submitted to the discretion of the jury.

In *Walrath v. Redfield*, 18 N. Y. 457, it was said that in general in actions *ex delicto* it is in the discretion of the jury whether to allow interest by way of damages or not. This was said in an action involving injury to property.

*Parrott v. Knickerbocker & N. Y. Ice Co.*, 46 N. Y. 361, states the rule to be that in cases of trover, replevin, and trespass, interest on the value of property unlawfully taken or treated is allowed by way of damages for the purpose of complete indemnity of the property injured, and that the same rule applies as to interest on the value of property lost or destroyed by the wrongful or negligent act of another.

In *McCormick v. Penn. Cen. R. R. Co.*, 49 N. Y. 303, it was said that in action of trover, interest is as necessary a part of the complete indemnity as the value itself, and in fixing the damages is no more in the discretion of the court.

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Code, § 1904, provides for interest in action for causing death by negligence.

**ARTICLE III.****SPECIAL DAMAGES.**

Where any special damages have naturally, and in sequence, resulted from the tort, they may be recovered. Underhill on Torts, 78.

All damages which ordinarily and in the natural course of things might fairly be expected to result, and have resulted, from the commission of the wrongful act, are recoverable, provided they are claimed by the plaintiff in his declaration. Addison on Torts, 1186.

Under a general allegation of damages, the plaintiff may prove and recover those damages which naturally and necessarily result from the act complained of; for these damages the law implies will proceed from it. These are called general, as contradistinguished from special, damages, which are the natural, but not the necessary, consequence. 1 Sutherland on Damages, 763.

"In cases of torts, it is necessary to show that the particular damage in respect of which the plaintiff proceeds must be the legal and natural consequence of the wrongful acts imputed to the defendant. (1 Chit. Pl. 388; 8 East, 3.) It is another rule that the special damage must be particularized, in order that the defendant may be able to meet the charge, if it be false; if it be not so stated, it cannot be given in evidence. And if the action be not sustainable, independent of the special damage, the declaration is bad on demurrer. (1 Chit. Pl. 389; 1 Saund. 243, note, 5, 8 T. R. 132.)" *Butler v. Kent*, 19 Johns. 223 (228).

"Where the damages actually sustained do not necessarily arise from the act complained of, and consequently are not implied by law, in order to prevent surprise to the defendant, the plaintiff must state in his declaration the particular damage which he has sustained, or he will not be permitted to give evidence of it upon the trial. This is the rule laid down by Mr. Chitty, Chitty Pl. 385-388; and he there refers to a great variety of cases to illustrate and support it. 8 T. R. 133; Peake's N. P. C. 46, 62; 9 Coke, 113-a; 1 Saund. 346-a, b, note 2; 2 East, 154; 1 Saund. 243, note 5; Viner's Abr. Ev. tit. b. 6. See also 9 Wend. 325. The doctrine is unquestionable." *Squier v. Gould*, 14 Wend. 160.

This case and *Armstrong v. Percy*, 5 Wend. 538, are cited with

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approval in *Stevens v. Rodger*, 25 Hun, 54, where it was held that the rule laid down in those cases is a salutary one, and that it applies with full force to pleadings under the Code.

In actions for torts, damages are either general or special. The former are such as the law implies to have accrued from the wrong complained of. The latter are such as really took place, and are not implied by law, and are superadded to general damages arising from an act injurious in itself, as when some particular loss arises from the uttering of slanderous words actionable in themselves; or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences, as when words become actionable only by reason of special damage ensuing. The former description need not be stated in the declaration, for the reason that presumptions of law are not in general to be pleaded. But the latter, when the law does not necessarily imply that the plaintiff sustained damage by the act complained of, is essential to the validity of the declaration to show particularly. And when the damages sustained do not *necessarily* arise from the act complained of, and consequently are not *implied* by law, the plaintiff must in general state the particular damage which he has sustained, or he will not be permitted to give evidence of it. (1 Chit. Pl. 385; *Butler v. Kent*, 19 Johns. 228); *Dumont v. Smith*, 4 Den. 319 (322).

Special damages, although the natural result of an injury, if they are not the necessary result, ought to be pleaded. *Cibulski v. Hutton*, 47 App. Div. 108, 62 N. Y. Supp. 166, citing *Hergert v. Union Ry. Co.*, 25 App. Div. 218, 49 N. Y. Supp. 307.

The plaintiff is entitled to recover, as a recompense for his injury, all the damages which are the natural and proximate consequence of the act complained of. (2 Greenl. Ev., § 256.) Those which necessarily result from the injury are termed general damages, and may be shown under the general allegation of damages at the end of the declaration. But such damages as are the natural, although not the necessary, result of the injury are termed special damages, and must be stated in the declaration to prevent a surprise upon the defendant; and, being so stated, may be recovered. *Vanderslice v. Newton*, 4 N. Y. 130 (132).

Where the damages necessarily result and naturally flow from the injury complained of, they may be recovered without any special averment. *Jutte v. Hughes*, 67 N. Y. 267.

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Where the damages are such as necessarily and naturally result from the injury complained of, it is not necessary that they should be specially averred in order to authorize a recovery. *Argotsinger v. Vines*, 82 N. Y. 308 (314).

Under an allegation in a complaint that, by reason of the failure of defendant to keep drains on his premises in repair, water overflowed on plaintiff's premises, interfering with their use, it was held that the plaintiff might show he had lost rents by consequence of the flow of the waters into his cellars, and that it was not necessary to plead loss of rents as special damages; that they were such as necessarily and naturally resulted from the injury complained of, and a special averment was not necessary in order to authorize a recovery. *Jutte v. Hughes*, 67 N. Y. 267.

When a plaintiff alleges that his person has been injured and proves the allegation, the law implies damages, and he may recover such as necessarily and immediately flow from the injury (which are called general damages), under a general allegation that damages were sustained; but if he seeks to recover damages for consequences which do not necessarily and immediately flow from the injury (which are called special damages), he must allege the special damages which he seeks to recover. *Gumb v. Twenty-third St. Ry. Co.*, 114 N. Y. 411 (414).

## ARTICLE IV.

### CONSEQUENTIAL DAMAGES.

It is not an answer to a claim to recover damages for a tort that the injury suffered was the result of a series of acts, some of which were lawful and innocent; nor is the plaintiff precluded from proving these lawful acts, which are essential links in the chain constituting the wrong complained of. *Rich v. N. Y. C. & H. R. R. Co.*, 87 N. Y. 382.

When an injury is not direct, but consequential, such as is caused by concussion from a blast which by shaking the earth injures the property, there is no liability in the absence of negligence. *Sullivan v. Dounham*, 161 N. Y. 290 (296), citing *Benner v. Atlantic Dredging Co.*, 134 N. Y. 156, distinguishing *Hay v. Cohoes Co.*, 2 N. Y. 159; *Tremain v. Cohoes Co.*, 2 N. Y. 163; *St. Peter v. Denison*, 58 N. Y. 416.

The doctrine is well established in this State that public officers

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lawfully employed in making public improvements and corporations engaged in the performance of work of a public nature, authorized by law, are not liable for consequential damages occasioned by it to others, unless caused by misconduct, negligence, or unskillfulness. *Atwater v. Trustees*, 124 N. Y. 602 (608), citing numerous authorities.

When a municipal corporation has general authority by statute to make a public improvement in a public street which does not involve direct encroachment upon private property, it is not liable for consequential damages, unless they are caused by negligence, misconduct, or want of skill on the part of its agents or servants. *Uppington v. City of New York*, 165 N. Y. 222 (229).

Where the property of an abutting owner is damaged, or even his easements interfered with in consequence of the work of an improvement in a public street conducted under a lawful authority, he is without remedy or redress, even though no provision for compensation is made in the statute. Whatever detriment the improvement may be to the abutter in such cases is held to be *damnum abseque injuria*. *Fries v. N. Y. & H. R. R. Co.*, 169 N. Y. 270 (277), citing *Radcliff's Exrs. v. Mayor, etc., of Brooklyn*, 4 N. Y. 195; *Folmsbee v. City of Amsterdam*, 142 N. Y. 118; *Talbot v. N. Y. & H. R. R. Co.*, 151 N. Y. 155; *Rauenstein v. N. Y., L. & W. Ry. Co.*, 136 N. Y. 528; *Muhlker v. N. Y., N. H. & H. R. R. Co.*, 173 N. Y. 549.

But where the injury is so direct as to amount to an invasion of a private right, which no legislative sanction can justify or excuse, a recovery may be had. *Huffmire v. City of Brooklyn*, 162 N. Y. 584.

An act done under a lawful authority, if done in a proper manner, will not subject the party doing it to an action for the consequences, whatever they may be, nor will a man be answerable for the consequences of enjoying his own property in the way such property is usually enjoyed, unless an injury results to another from the want of proper care or skill on his part. But an action will lie where a man goes beyond the legitimate use of his own property; where he enters or casts anything upon the land of another; where he diverts a stream of water from his neighbor's land, without having title to anything more than the usufruct; or where he uses his own property in such a negligent and improper manner as to cause injury to others. *Radcliff's*

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*Executors v. Mayor, etc., of Brooklyn*, 4 N. Y. 196, cited and followed in *Rauenstein v. N. Y., L. & W. R. R. Co.*, 136 N. Y. 528 (537).

Municipal corporations, engaged in the performance of works of a public nature authorized by law, are not liable for consequential damages occasioned thereby, to others, where private property is not directly encroached upon, unless such damages are caused by misconduct, negligence, or unskillfulness. *Atwater v. Trustees of Village of Canandaigua*, 124 N. Y. 602.

When a municipal corporation has general authority by statute to make a public improvement in a public street, which does not involve direct encroachment upon private property, it is not liable for consequential damages, unless they are caused by negligence, misconduct, or want of skill on the part of its servants or agents. (*Atwater v. Trustees of Canandaigua*, 124 N. Y. 602; *Radcliff v. Mayor, etc.*, 4 N. Y. 195; *Transportation Co. v. Chicago*, 99 U. S. 635; 2 Dill. on Mun. Corp., § 1029; *Shearman & Redfield's Negligence*, § 272.) In such cases the corporation is the agent of the State, and acts done in the proper exercise of governmental powers do not make such agent liable at common law, even if they indirectly affect, but do not directly invade private property. If the work is unlawful, the injury willful, or the damages are owing to the failure of the proper authorities to exercise due care or skill, there is no exemption from liability, even when the undertaking is wholly for the benefit of the public. *Uppington v. City of New York*, 165 N. Y. 222 (229).

When in the exercise of authority conferred upon them by the legislature, municipal corporations perform acts as a result of which some indirect or consequential injury is sustained by an individual, the latter has no right of action for such injury. Such injuries are *damnum absque injuria*. But when a municipal corporation takes the property of an individual it must pay for it. *Huffmire v. City of Brooklyn*, 162 N. Y. 584 (591).

When the sovereign power of a State has interfered for a public purpose by a law expressly and specifically authorizing a direct and certain act, party performing such act is not liable for any consequential damages he may have sustained by reason of the defendant's having obeyed the mandate of the State. *Fries v. N. Y. & N. H. R. R. Co.*, 169 N. Y. 270 (277, 283).

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## ARTICLE V.

## PROSPECTIVE DAMAGES.

In *Witherbee v. Meyer*, 155 N. Y. 446; s. c., 5 N. Y. Annot. Cas. 167, opinion Parker, Ch. J., it is said (p. 168): "The general rule is that the party injured is entitled to recover all of his damages, including gains prevented as well as losses sustained, but this rule is subject always to two conditions: First, that the damages shall be such as must have been fairly within the contemplation of the parties to the contract at the time it was made; and, second, they must be certain, not only in their nature, but as respects the cause from which they proceed, for the law wisely adopts that mode of estimating damages which is most definite and certain." Citing *Freeman v. Clute*, 3 Barb. 424; *Griffin v. Colver*, 16 N. Y. 489; *Rogers v. Bemus*, 69 Pa. St. 432; *Penny-packer v. Jones*, 106 Pa. St. 237; *Cassidy v. LeFevre*, 45 N. Y. 562; *Manhattan Stamping Works v. Koehler*, 45 Hun, 150; *Rochester Lantern Co. v. Stiles & Parker P. Co.*, 135 N. Y. 209.

In a very full note to this case in 5 N. Y. Annot. Cas. at p. 170, it is said: "How far prospective damages should be allowed as an element of damages for the breach of a contract or for a tort, has always been a mooted question, as shown by the frequent discussions of the subject by the courts. The courts have frankly admitted the difficulty of establishing fixed rules in this respect."

In this note a number of cases, both as to contracts and torts, are referred to. Among those laying down the rule as to right to recover for profits prevented, where the action is in tort, are: *Ebenreiter v. Dahlman*, 19 Misc. Rep. 9, 42 N. Y. Supp. 867; *Langan v. Potter*, 8 Misc. Rep. 541, 28 N. Y. Supp. 752; *Wolff v. Hvass*, 11 Misc. Rep. 561, 32 N. Y. Supp. 798; *Schalscha v. Third Ave. R. R. Co.*, 19 Misc. Rep. 141, 43 N. Y. Supp. 251; *Feinstein v. Jacobs*, 15 Misc. Rep. 474, 37 N. Y. Supp. 345; *Goldschmid v. City of New York*, 14 App. Div. 135, 43 N. Y. Supp. 447; *Carpenter v. Pennsylvania R. R. Co.*, 13 App. Div. 328, 43 N. Y. Supp. 203; *Snow v. Pulitzer*, 142 N. Y. 263; *Jutte v. Hughes*, 67 N. Y. 267; *Schile v. Brokhahus*, 80 N. Y. 614; *Whitehall Transportation Co. v. N. J. Steamboat Co.*, 51 N. Y. 369; *Evans v. Keystone Gas Co.*, 148 N. Y. 112, and *Leach v. N. Y., N. H. & H. R. R. Co.*, 89 Hun, 377,

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35 N. Y. Supp. 305, where it was held, per Follett, J. (p. 380): "When it is uncertain whether damages have been caused by the violation of a contract, none can be recovered, a jury not being permitted to speculate whether damages may not have been occasioned; but when it appears that damages have been caused by the breach of a contract, the amount of which is uncertain and incapable of ascertainment by computation or by direct evidence, the injured party is entitled to recover such as he can show to be the direct results of the breach of the contract. In many cases the damages can be ascertained by computation, or are in their nature capable of being definitely fixed, and in such cases the parties are confined to direct evidence and are not permitted to prove collateral facts from which inferences as to the amount of damages sustained may be drawn. In cases where the damages cannot be fixed by computation or by direct evidence, the kind and character of evidence admissible for the purpose of proving the damages depend upon the circumstances of each case. Evidence which would be quite competent in one case would be utterly incompetent in another, and the inquiry always is whether, under the circumstances of the case in hand, evidence has been given which would authorize a jury to award more damages than are shown to flow directly from the breach of the contract."

In *Snow v. Pulitzer*, 142 N. Y. 263, it was said, opinion per Earl, J.: "But the principal item of recovery was on account of the prospective profits from the plaintiff's business during the remainder of the term of his lease, and that they were proper to be considered in estimating his damages in a case like this, where he was evicted and his business broken up by the trespass and wrong of the defendant, was decided in *Schile v. Brokhahus*, 80 N. Y. 614."

The rule referred to is recognized in *Hangen v. Hachemeister*, 114 N. Y. 566.

In an action at law for a trespass committed in piling dirt upon the plaintiff's land, his recovery is limited to damages accruing prior to the commencement of the action, and he cannot recover prospective damages, based upon the theory that the trespass will be permanent; it is, therefore, error for the court to charge that he is entitled to recover the difference between the value of the land with, and its value without, the dirt upon it. *Mott v. Lewis*, 52 App. Div. 558, 65 N. Y. Supp. 31, citing



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numerous authorities. This rule was applied as to damages for loss of prospective crops. *Gillett v. Trustees of Kinderhook*, 77 Hun, 604; *Kinsey v. City of New York*, 75 App. Div. 262; *Rusert v. City of New York*, 69 App. Div. 302.

In *Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98, the court considered the right to recover for prospective damages for an unlawful structure erected upon plaintiff's premises. It was held that, "Where a railroad is unlawfully constructed in a street, in an action by an adjacent owner to recover damages, he is entitled to recover simply the damages sustained up to the commencement of the action, and it seems for any damages thereafter sustained, other actions may be brought successively until the nuisance shall be abated. The structure being a nuisance, the railroad company is under legal obligation to remove it, and it is not to be presumed that it will continue it permanently. Damages, therefore, may not be awarded upon that assumption, nor will the judgment operate as a purchase of the right to have the structure remain.

"Accordingly held, that proof and an allowance as damage for the permanent diminution in the market value of plaintiff's lots was improper, conceding that the embankment was unlawfully constructed.

"It seems that where a railroad is unlawfully constructed in a street, the adjacent owner has these remedies: he may bring successive suits to recover his damages; he may bring an action in equity to restrain the operation of the road and compel the abatement of the nuisance; or when the highway has been exclusively appropriated, he may maintain an action of ejectment.

"The authorities upon the subject of the damages recoverable in actions of trespass collated and discussed."

It is said of this case in *Sutherland v. City of Brooklyn*, 156 N. Y. 605, that the rule of damages is so exhaustively examined in the opinion of Judge Earl that it is unnecessary to review the authorities in detail.

"Where one has trespassed upon the lands of another, and the encroachment is practically a permanent one, the rule of damages is the difference between the value of the property before the trespass was committed and afterward (*Argotsinger v. Vines*, 82 N. Y. 308), or, as it has been otherwise expressed, the measure of damages is the 'depreciation in the value of the property.'

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(Sutherland on Damages, § 1017.)” *Goldschmid v. City of New York*, 14 App. Div. 135 (141), 43 N. Y. Supp. 447.

## ARTICLE VI.

## SPECULATIVE DAMAGES.

Damages that are uncertain, contingent, or speculative are not recoverable. Damages may be speculative or uncertain in several respects. First, it may be uncertain whether the party claiming damages has in a legal sense been damaged at all. Second, though damages from some cause be shown, it may be uncertain whether in the particular case they resulted from the defendant's acts. Or third, the damages may be wholly uncertain in measure or extent. 8 Am. & Eng. Encyc. of Law (2d ed.), 608.

It is frequently difficult in the administration of the law to apply the proper rule of damages, and the decisions upon the subject are not harmonious. The cardinal rule undoubtedly is that the one party shall recover all the damage which has been occasioned by the breach of the contract by the other party. But this rule is modified in its application by two others: The damages must flow directly and naturally from the breach of the contract, and they must be certain, both in their nature and in respect of the cause from which they proceeded. Under this latter rule speculative, contingent, and remote damages which cannot be directly traced to the breach complained of are excluded. Under the former rule such damages only are allowed as the parties may fairly be supposed when they made the contract to have contemplated as naturally following its violation. (*Hadley v. Baxendale*, 9 Exch. 341; *Griffin v. Colver*, 16 N. Y. 489; *Leonard v. N. Y. etc., Tel. Co.*, 41 N. Y. 544, 566; *Cassidy v. LeFevre*, 45 N. Y. 562.) *Rochester Lantern Co. v. The Stiles & Parker Press Co.*, 135 N. Y. 209 (217).

Where a wrong had been done from which pecuniary injury has resulted, or where injury is the natural or probable result of a wrong, the injured party is not remediless, although the extent of the injury is not capable of precise proof. The jury in such a case may fix the damages within reasonable limits, as best they may. Actions for defamation or involving recovery for pain or suffering are examples. But where damages claimed are neither the probable result of the wrong nor capable of proof, they cannot be awarded by the jury. It is not in the interest of justice

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Art. 7. Nominal Damages.

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to extend the field of speculation in jury trials beyond its present limits, and to sustain the ruling in this case would go beyond what has been hitherto sanctioned by the courts. *Butler v. Manhattan Ry. Co.*, 143 N. Y. 417 (422).

The authorities on this subject are collated and considered in *Witherbee v. Meyer*, 155 N. Y. 446, opinion Parker, Ch. J.

**ARTICLE VII.****NOMINAL DAMAGES.**

Damages may be classed as nominal, compensatory, and exemplary; the latter also termed punitive or vindictive damages, or popularly termed "smart money." Nominal damages are damages insignificant in amount — a sum of money that can be spoken of, but has no existence in point of quantity — such as are awarded only in cases where the law presumes the damage. Whenever the law presumes damage it presumes the least possible amount, that is, nominal damages. Hale on Damages, 24.

In this class of cases a wrong can be shown without proof of damage. There is a legal presumption that a right has been evaded and that damages follow; but, in the absence of proof as to the amount, nominal damages are given. Sutherland on Damages, 18; *Webb v. Portland Mfg. Co.*, 3 Sumn. 189.

Damages may be nominal, ordinary, or exemplary. Nominal damages are a sum of so little value as compared with the cost and trouble of suing that it may be said to have "no existence in point of quantity," such as a shilling or a penny, which sum is awarded with the purpose of not giving any real compensation. Such a verdict means one of two things. According to the nature of the case it may be honorable or contumelious to the plaintiff. Either the purpose of the action is merely to establish a right, no substantial harm or loss having been suffered, or else the jury, while unable to deny that some legal wrong has been done to the plaintiff, have formed a very low opinion of the general merits of his case. This, again, may be on the ground that the harm he suffered was not worth suing for, or that his own conduct had been such that whatever he did suffer at the defendant's hands was morally deserved. The former state of things, where the verdict really operates as a simple declaration of rights between the parties, is most commonly exemplified in actions of trespass brought to settle disputed claims to rights of way, rights of com-

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mon, and other easements and profits. The other kind of award of nominal damages, where the plaintiff's demerits earn him an illusory sum, such as one farthing, is illustrated chiefly by cases of defamation, where the words spoken or written by the defendant cannot be fully justified, and yet the plaintiff has done so much to provoke them, or is a person of such generally worthless character as not to deserve, in the opinion of the jury, any substantial compensation. Webb's Pollock on Torts, 212, 213, 214.

There is a class of cases where nominal damages may settle a question of title or determine rights of the greatest importance. A leading principle which the courts ever bear in mind is that wherever there is a wrong, there should be a remedy to redress it. Citing authorities that where defendant has broken a contract, plaintiff is entitled to recover at least nominal damages. *Deven-dorf v. Wert*, 42 Barb. 227.

Where it is not possible, from the nature of the case, to establish the extent of the injury to reasonable certainty, only nominal damages can be recovered. *Taylor v. Bradley*, 39 N. Y. 129; *Washburn v. Hubbard*, 6 Lans. 11.

Actual damage is not necessary to an action; a violation of right with the possibility of damage forms the ground of an action. *Allaire v. Whitney*, 1 Hill, 484 (487), citing *Ashby v. White*, 2 Ld. Raym. 948; *Crooker v. Bragg*, 10 Wend. 260.

The rule was reaffirmed in *Whitney v. Allaire*, 4 Den. 554.

It is said in *Dixon v. Clough*, 24 Wend. 187, that unauthorized entry upon the land of another is a trespass, and whether the owner suffered much or little, he is entitled to a verdict for some damages. In that case it was said that the action was brought for the purpose of trying the existence of the defendant's right.

An action is frequently a vindication of plaintiff's title, even though he recovers only nominal damages. *Hammond v. Zehner*, 21 N. Y. 118; *N. Y. Rubber Co. v. Rothery*, 132 N. Y. 293 (297).

Generally when one encroaches upon the right of another, the law gives a right of action and nominal damages may be recovered in order to prevent the encroachment from ripening into a legal right. *Webb v. Portland Mfg. Co.*, 3 Sumn. 189.

Where there is a diversion of the waters of the stream, which materially diminishes its natural flow over the lands of a proprietor below, he may maintain an action and is entitled to re-

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Art. 8. Compensatory Damages.

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cover nominal damages, although he has as yet made no use of the waters, or water enough is left in the stream for the purposes of his business as then conducted. This right to recover nominal damages is substantial, as it confirms the proprietor's right to the beneficial use of the waters of the stream as it was accustomed to flow before the diversion, and if withheld might tend to impeach or destroy his title by adverse user. *N. Y. Rubber Co. v. Rothery*, 132 N. Y. 293.

**ARTICLE VIII.****COMPENSATORY DAMAGES.**

The cardinal principle governing the award of damages both in cases of tort and breaches of contract is that plaintiff should receive a just compensation for the loss suffered. *Hale on Damages*, 33.

Although the law does not attempt the impossibility of replacing the plaintiff in exactly the position he was in before the injury, yet, within the bounds of possibility, its aim is compensation. *Sedgwick on Damages*, 50.

The damages recoverable in actions for torts or wrongs have long since been classified into compensatory and punitive or exemplary. Compensatory damages are not recoverable, except upon proof of certain facts, and punitive damages are not recoverable without proof of facts additional to the facts required to recover compensatory damages. The distinction between the two kinds is quite as well defined and is as essential as the distinction between different causes of action. Compensatory damages, as indicated by the word employed to characterize them, simply make good or replace the loss caused by the wrong. Exemplary damages, as also indicated by the word employed to characterize them, besides making good the loss, serve to punish and make an example of the wrongdoer. *Voltz v. Blackmar*, 64 N. Y. 440-444; *Fischer v. Met. El. R. R. Co.*, 34 Hun, 433; *Rawlins v. Vidvard*, 34 Hun, 205, and the authorities cited by the justice in delivering the opinion of the General Term, at page 208.

Compensatory damages proceed from a sense of natural justice and are designed to repair that of which one has been deprived by the wrong of another. To this species of damages the legislature or the courts have, from time to time, in certain classes of wrongs, added another kind of damage, when their commission

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was prompted or characterized by motives of malice, cruelty, oppression, wantonness, or recklessness. *Reid v. Terwilliger*, 116 N. Y. 530 (534).

The rule of recovery is compensation. Where the loss is pecuniary and is present and actual and can be measured, but no evidence is given showing its extent, or from which it can be inferred, the jury can allow nominal damages only. *Leeds v. Metropolitan Gas Light Co.*, 90 N. Y. 26, cited in *Countryman v. Fonda, J. & G. R. R. Co.*, 166 N. Y. 201 (208). *Baker v. Manh. R. R. Co.*, 118 N. Y. 536 (537).

In actions for personal torts, the compensatory damages which may be recovered of the principal for the wrongful act of an agent include not merely plaintiff's pecuniary loss but also compensation for mental suffering. 2 *Wait's Actions and Defenses*, 445, citing *Hamilton v. Third Ave. R. R. Co.*, 53 N. Y. 95; *Townsend v. N. Y. C. R. R. Co.*, 56 N. Y. 295; *Weed v. Panama R. R. Co.*, 17 N. Y. 362.

## ARTICLE IX.

## EXEMPLARY DAMAGES.

Punitive, vindictive, and exemplary damages are in their legal contemplation synonymous terms. 2 *Wait's Actions and Defenses*, 446, citing *Chiles v. Drake*, 2 Metc. 146.

The object of exemplary or punitive damages has been held to be to compensate the person injured and to punish the offender, with all that punishment implies; that is, in addition to inflicting a penalty for the past offense, to deter the offender from the commission of similar wrongs in the future, as well as all other persons by the example thereby afforded. 12 *Am. & Eng. Encyc. of Law* (2d ed.), 6.

"The distinction between compensatory and exemplary damages is quite as well defined and as essential as the distinction between different causes of action. Compensatory damages, as indicated by the word employed to characterize them, simply make good or replace the loss caused by the wrong. Exemplary damages, as also indicated by the word employed to characterize them, besides making good the loss, serve to punish and make an example of the wrongdoer." *Reid v. Terwilliger*, 116 N. Y. 530 (534).

In vindictive actions jurors are always authorized to give exemplary damages where the injury is attended with circumstances

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of aggravation, and the rule is laid down without the qualification that we are to regard either the possible or the actual punishment of the defendant by indictment and conviction at the suit of the people. *Cook v. Ellis*, 6 Hill, 466.

In vindictive actions, as they are sometimes termed, such as libel, assault and battery, and false imprisonment, the conduct and motive of the defendant is open to inquiry, with a view to the assessment of damages; and if the defendant, in committing the wrong complained of, acted recklessly or willfully and maliciously, with a design to oppress and injure the plaintiff, the jury, in fixing the damages, may disregard the rule of compensation, and beyond that may, as a punishment to the defendant, and as a protection to society against a violation of personal rights and social order, award such additional damages as in their discretion they may deem proper. The same rule has been held to apply in the case of a willful injury to property, and in actions of tort founded upon negligence, amounting to misconduct and recklessness. *Voltz v. Blackmar*, 64 N. Y. 440 (444), citing *Tillotson v. Cheetham*, 3 Johns. 56; *King v. Root*, 4 Wend. 113; *Tift v. Culver*, 3 Hill, 180; *Cook v. Ellis*, 6 Hill, 466; *Burr v. Burr*, 7 Hill, 207; *Taylor v. Church*, 8 N. Y. 460; *Hunt v. Bennett*, 19 N. Y. 174; *Millard v. Brown*, 35 N. Y. 297.

To justify an award of exemplary damages the evidence must show on the defendant's part malice, or fraud, or gross negligence. The act causing the damage must be wanton or malicious, or gross or outrageous, or there must appear a design to oppress and injure. The purpose of awarding such damages is to punish a wrongdoer, and unless a wrong motive exists there is no basis for such award. *Powers v. Manhattan Ry. Co.*, 120 N. Y. 178 (182).

Where there is a deliberate intention to injure plaintiff a jury may give "such further damages as are suited to the aggravated character which the act assumes and as are necessary as an example to deter from the doing of such injury." The principle is well established that in actions for injuries to the person, committed under the influence of actual malice, or with intent to injure the plaintiff, the jury, in their discretion, may give damages beyond the actual injuries sustained, for the sake of the example. Damages not only to recompense the sufferer, but to punish the offender. *Taylor v. Church*, 8 N. Y. 452, collating authorities and calling attention to the fact that most if not all the authorities

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upon this subject were cited by counsel in *Kendall v. Stone*, 5 N. Y. 14.

It was said by Andrews, Ch. J., in *Holmes v. Jones*, 147 N. Y. 59 (67), in an action of libel, that the amount of damages is peculiarly within the province of the jury. That the jury may give nominal damages, or damages to a greater or less amount, as they shall determine. The jury may award damages which are merely compensatory, or damages beyond mere compensation, called punitive or vindictive damages, by way of example or punishment, when in their judgment the defendant was incited by actual malice or acted wantonly or recklessly in making the defamatory charge.

In the same case on previous appeal, Earl, J., said, 121 N. Y. 461 (467): "That if the jury came to the conclusion from the circumstances and nature of the charge made in the libel, that the publication was malicious, in bad faith, or recklessly, or carelessly, or wantonly made, they could go beyond compensation and award punitive damages."

These cases and that of *Warner v. Press Co.*, 132 N. Y. 181, are cited with approval. *Smith v. Matthews*, 152 N. Y. 152 (158).

In all actions on the case for torts a jury may give exemplary or vindictive damages, depending upon the peculiar circumstances of each case, but counsel fees as such ought not to be taken as the measure of punishment or a necessary element in its infliction. *Day v. Woodworth*, 13 How. (U. S.) 363.

Exemplary damages may be given for torts to personal property. *Schuler v. Roberts*, 21 N. Y. Supp. 27; *Schuler v. Roberts*, Memorandum, 66 Hun, 626.

In case of wanton cruelty. *Wort v. Jenkins*, 14 Johns. 351, cited *Taylor v. Church*, 8 N. Y. 452 (462); *Bump v. Betts*, 23 Wend. 85.

For injuries to real property. *Allaback v. Utt*, 51 N. Y. 651.

Exemplary damages are not allowed where there has been no intentional offense committed, but where defendant has only done what he honestly believed to be his duty. *Hamilton v. Third Ave. R. R. Co.*, 53 N. Y. 25.

It is said in *Dyke v. National Transit Co.*, 22 App. Div. 360 (362), 49 N. Y. Supp. 180, "Punitive damages are not the plaintiff's right, but are given, as said in *Livingstone v.*



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*Rawyards Coal Co.*, (5 App. Cas. 25, 33 Moak's Eng. Rep. 622), when the court 'will assert its authority to punish fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect of what he has so done.' In *Loos v. Wilkinson* (113 N. Y. 497) it is said: 'It is the general rule, even in actions to recover damages for pure torts, that the plaintiff shall recover compensation for such damages only as he has actually suffered; and such is the invariable rule in all cases, except where \* \* \* punitive damages may be awarded, and in such cases courts are constantly striving to come nearer to the rule of compensation. It is not denied that there are many cases of purely constructive torts in which the courts have permitted the injured party to recover more than he has lost. Of course, as against such a wrongdoer, the courts ought to award the injured party full indemnity, and need not scrimp the measure. Hence, I suspect, it is that they have taken the less pains to notice that the rules which they follow are punitive in their nature, and should be limited to cases in which the wrongdoer deserves punishment.' "

Punitive damages being imposed as a punishment for the willful or reckless misconduct of a wrongdoer, cannot be inflicted regardless of his intent, whether good or bad. *Donivan v. Manhattan Ry. Co.*, 1 Misc. Rep. 368, 21 N. Y. Supp. 457.

The opinion of Pryor, J., collates authorities upon the subject of punitive damages and discusses the question as to whether a corporation, master, is responsible for punitive damages for an inexcusable assault and battery to its servant. *Held*, that when the evidence authorizes the inference that the servant acted from an innocent motive and from the supposed discharge of his duty, punitive damages cannot be allowed.

While a master is liable in compensatory damages for an illegal arrest caused by his servant, if his manner of conducting business justified the jury in believing that the servant in causing such arrest was acting within the scope of his employment and discharging the ordinary duties imposed upon him, he cannot be held liable for punitive or vindictive damages by reason of wanton, oppressive, or malicious acts of the servant, unless there is proof to implicate him and make him *particeps criminis* of his servant's acts; and in an action brought against a master for an illegal ar-

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rest caused by his servant, it is reversible error for the trial court, after instructing the jury as to the law of compensatory damages, to instruct them that they had also the power, if they thought proper, to award punitive or vindictive damages in addition to the amount fixed by them for compensatory damages, without further instructing them that such damages should not be awarded unless there was proof showing that the acts of the servant were wanton, oppressive, or malicious and that the master was implicated with the servant therein, or had either expressly or impliedly authorized or ratified them. *Craven v. Bloomingdale*, 171 N. Y. 439.

**ARTICLE X.****MITIGATION OF DAMAGES.**

Mitigation of damages is what the expression imports, a reduction of the amount of damages; not by proof of facts which are a bar to a part of the plaintiff's cause of action or a justification, nor yet of facts which constitute a cause of action in favor of the decedent, but rather facts which show that the plaintiff's conceded cause of action does not entitle him to so large an amount as the showing on his side would otherwise justify the jury in allowing him. 1 Sutherland on Damages, 226.

Matters may be shown in mitigation which are not a full excuse or justification, but tend to excuse or justify the act complained of. 1 Sutherland on Damages, 227.

"As a ground of provocation for an attack, either upon the person or the character of an individual, whatever took place at the time may be given in evidence by the defendant in mitigation of damages, for the law makes allowance for the infirmities of human nature and for what is done in the heat of passion, produced by the improper conduct of the adverse party. The principle on which this evidence of provocation is received is the same, whether the suit is for an injury done to the character or to the person of the plaintiff." *Maynard v. Beardsley*, 7 Wend. 560 (564), opinion of Walworth, Chancellor.

Although provocation fails to justify the defendant, it may be relied upon by him in mitigation, even of compensatory damages. This is correlative to the rule which permits circumstances of aggravation, such as time and place of an assault or insulting words, or other circumstances of indignity and contumely, to increase them. *Kiff v. Youmans*, 86 N. Y. 324 (330).

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Art. 10. Mitigation of Damages.

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The rule as to evidence in mitigation of damages is considered in *McKyring v. Bull*, 16 N. Y. 297, under the provisions of the old Code. Attention is here called to the case as citing authorities upon mitigation of damages at common law. See Code, § 536, for rule as to pleading.

Any act of plaintiff enhancing the injury resulting from the act complained of may be shown in mitigation. 1 Sutherland on Damages, 237.

It cannot be said, as a matter of law, that a person who has sustained personal injuries through the negligence of another is bound to use any particular means to reduce the damage, unless the particular means would necessarily have that result and would be such as a reasonable and prudent man would use; he is not bound, as a matter of law, to use a particular means to effect a cure which would or might cause him to suffer more serious injury or death. The rule of damages in such cases is not at all doubtful. It is, that the party who claims to have suffered damage by the tort of another party is bound to use reasonable and proper efforts to make the damage as small as practicable, and that he is not entitled to recover for any damage which, by the use of such efforts, might have been avoided, because they are not to be regarded as the natural result of the tort. 8 Am. & Eng. Encyc. of Law (2d ed.), 605; *Blate v. Third Ave. R. R. Co.*, 44 App. Div. 163 (167), 60 N. Y. Supp. 732.

Where neglect on the part of the plaintiff to do anything to lessen the amount of damages is shown, the burden is upon him to show that the neglect did not contribute to the injury. It is a question for the jury, and the defendant is not called upon to show that the neglect contributed to the injury. *Morrison v. Long Island R. R. Co.*, 3 App. Div. 205, 38 N. Y. Supp. 393.

Acts of the parties by which the loss or injury has been reduced or partially compensated, or any peculiar or exceptional facts tending to show that plaintiff's injury is less than it would appear to be, or that of the defendant less culpable, may be shown in mitigation. Sutherland on Damages, 238, 244; *Russell v. Turner*, 7 Johns. 189; *Allen v. Suydam*, 20 Wend. 321; *Ledyard v. Jones*, 7 N. Y. 550; *Ball v. Liney*, 48 N. Y. 6; *Bank of Rome v. Curtiss*, 1 Hill, 275.

No attempt is made to collate the authorities on this subject,

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Art. 10. Mitigation of Damages.

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as they more properly belong to the consideration of the particular causes of action under which they will be more fully considered.

In actions for damages for the value of property lost or converted, evidence that the real value of the property is less than the apparent value is admissible. *Potter v. Merchants' Bank*, 28 N. Y. 641.

In *Remsen v. Bryant*, 24 Misc. Rep. 238 (240), 52 N. Y. Supp. 515, Gaynor, J., says: "Nor can the actual damage to the plaintiff be whittled down or mitigated by proof of lack of malice in the defendant in actions of tort. It is only the smart money that can be mitigated or prevented by such proof." Citing *Millard v. Brown*, 35 N. Y. 297 (300), in which Morgan, J., delivering the opinion of the court, says: "It is believed that in cases of *tort* to the property, where there are no circumstances of aggravation, the rule of damages is the same as in cases of contract. When the injury is to the person or character or feeling, and the facts disclose fraud, malice, violence, cruelty, or the like, damages may be given by way of punishment for the benefit of the community and as a restraint to the transgressor." Citing *Mayne on Damages*, 13.

In *Wuensch v. Morning Journal Assn.*, 4 App. Div. 110 (115), 38 N. Y. Supp. 605, it was said that mitigation extends only to punitive or exemplary damages. (See Code, § 536.)

It is of the essence of mitigating circumstances that they do not constitute a total defense to the action, but are those facts from which the party acting upon them might reasonably suppose that the offense, for the punishment of which the prosecution was instituted, had been committed by the defendant therein. It also follows from this fact that the rules by which the sufficiency of a pleading is ordinarily determined, viz., materiality and relevancy, cannot be applied in all of their strictness to a partial defense by way of mitigating circumstances. *Bradner v. Faulkner*, 93 N. Y. 515 (517).

The burden of proving that the damages which had been sustained by the plaintiff could have been prevented unquestionably rests upon the party guilty of the breach. *Hamilton v. McPherson*, 28 N. Y. 72-77, citing *Costigan v. Railroad Co.*, 2 Den. 609.

It is said in *Lanpher v. Clark*, 149 N. Y., opinion of O'Brien, J., at page 476, that the defendant may prove, under section 536, by way of mitigation, any facts not amounting to a total defense, tending to mitigate or reduce the damages, if they are set forth

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Art. 11. Aggravation of Damages.

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in the answer, either with or without one or more defenses to the entire cause of action when a defense is interposed.

In actions for personal wrongs, the defendant, who does not deny that the verdict must pass against him, may give evidence to show that the plaintiff in some degree brought the thing upon herself. And when the words "in mitigation" are used in cases other than those of slander and libel, they still refer to such damages as are punitive or exemplary. In this sense the words are used in the Code of Civil Procedure (§ 536). Under a general denial it must always be proper to give evidence tending to reduce or mitigate the actual damages suffered by plaintiff. *Wandell v. Edwards*, 25 Hun, 500, citing *Fraser v. Berkeley*, 7 Car & P. 621.

Damages actually sustained cannot be mitigated by speculating upon what might have followed a different course of action. *Bills v. N. Y. C. R. R. Co.*, 84 N. Y. 5.

In an action to recover damages, evidence on the part of the defendant that the plaintiff was insured and had received payment on his insurance is not competent for the purpose of mitigating damages. *Carpenter v. Eastern Transportation Co.*, 71 N. Y. 574; *Briggs v. N. Y. C. & H. R. R. Co.*, 72 N. Y. 26.

Mayne on Damages, 92, gives the reason for this rule, that to permit a reduction of damages on such a ground would be to allow the wrongdoer to pay nothing and take all the benefit of a policy of insurance without paying a premium.

## ARTICLE XI.

### AGGRAVATION OF DAMAGES.

Circumstances of aggravation such as time and place of an assault, or insulting words, or other circumstances of indignity and contumely, may be given in evidence to increase damages. *Kiff v. Youmans*, 86 N. Y. 324.

The actual pecuniary damages in actions for torts can rarely be computed, and are never the sole rule of assessment. The state, degree, quality, trade, or profession of the party injured, as well as of the party who did the injury, must be and generally are considered by the jury in giving damages. *Tillotson v. Cheetham*, 3 Johns. 56 (63).

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 Art. 12. Liquidated Damages or Penalty.
 

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The facts which go to aggravate damages are incidentally discussed in *Burr v. Burr*, 7 Hill, 207, at p. 217, by Strong, Senator.

In actions of torts, the damages for which cannot be measured by a standard, all the facts constituting and accompanying the wrong should be proved; and though there be a legal standard for the principal wrong, if aggravations exist, they may be proved, to enhance damages; and every case of personal tort must necessarily go to the jury on its special facts. These embrace the *res gestæ*, and the age, sex, and *status* of the parties; this, whether the case be one for compensation only, or also for exemplary damages, where they are allowed. To rebut malice, the defendant may also show any pertinent facts. 1 Sutherland on Damages, 745, 746, 747.

## ARTICLE XII.

### LIQUIDATED DAMAGES OR PENALTY.

The question as to whether a stipulated sum agreed to be paid for nonperformance is liquidated damages or a penalty arises out of contract. If the payment of such sum is considered to be a penalty, it is in the nature of forfeiture for a breach. Earl, J., in *Kemp v. Knickerbocker Ice Co.*, 69 N. Y. 45 (57), says this question "has been frequently before the courts, and has given them much trouble. The cases cannot all be harmonized, and they furnish conspicuous examples of judicial efforts to make for parties wiser and more prudent contracts than they had made for themselves. Courts of law have, in some cases, assumed the functions of courts of equity, and have relieved parties by forced and unnatural constructions from stipulations highly penal. Where an amount, stipulated as liquidated damages, would be grossly in excess of the actual damages, they have leaned to hold it a penalty. Where the actual damages were uncertain and difficult of ascertainment, they have leaned to hold the stipulated amount to have been intended as liquidated damages. No form of words has been regarded as controlling. But the fundamental rule, as often announced, is that the construction of these stipulations depends, in each case, upon the intent of the parties, as evinced by the entire agreement construed in the light of the circumstances under which it was made," citing numerous authorities.

In *Little v. Banks*, 85 N. Y. 258, it is said that the rule of

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Art. 12. Liquidated Damages or Penalty.

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the courts is to arrive at the actual intention of the parties, but that this cannot be entirely determined by the use of the word "penalty," or the words "liquidated damages," and that the word "forfeit" is not conclusive; whether the sum agreed upon is to be regarded as a penalty must be arrived upon in view of the circumstances in each particular case.

Vann, J., in *Curtis v. Van Bergh*, 161 N. Y. 47, at p. 52, says, after citing authorities: "These authorities show that the courts have struggled hard against the apparent intention of the parties, in order to relieve the one in default from an improvident bargain. It is, however, the law of this State, as settled by this court, that where the language used is clear and explicit to that effect, the amount is to be deemed liquidated damages when the actual damages contemplated at the time the agreement was made are in their nature uncertain and unascertainable with exactness, and may be dependent upon extrinsic considerations and circumstances, and the amount is not, on the face of the contract, out of all proportion to the probable loss."

The rule deducible from all the cases is, that where it is ascertainable from the terms of an agreement, construed in the light of the surrounding circumstances under which it was made, that a sum of money is agreed upon by the parties as the measure of damage which will be sustained by the nonperformance of that agreement, and the sum thus agreed upon under the circumstances is not so excessive as to shock the moral sense, courts will hold the parties to their agreement and keep them bound by their contract. *Dunn v. Morgenthau*, 73 App. Div. 147 (148), 76 N. Y. Supp. 827, citing *Cotheal v. Talmage*, 9 N. Y. 554; *Clement v. Cash*, 21 N. Y. 258; *Kemp v. Knickerbocker Ice Co.*, 69 N. Y. 57; *Ward v. H. R. B. Co.*, 125 N. Y. 235; *Curtis v. Van Bergh*, 161 N. Y. 52; *Little v. Banks*, 85 N. Y. 265.

"The question is to be determined upon the intention of the parties as gathered from the language used in the contract considered in the light of the circumstances and conditions as they existed at the time when it was made. Where the language is clear and explicit, providing that the sum reserved is to be regarded as liquidated damages, effect will be given to such language unless the damages resulting from the breach are definitely ascertainable and the sum reserved is so great as to be an unconscionable measure for the damage sustained. If, however, the damages are

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 Art. 13. Double, Treble, and Increased Damages.
 

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certain and may be easily ascertained, and the sum reserved is unconscionable, although the language in terms expressly declares the sum to be liquidated damages and not a penalty, courts have uniformly disregarded the express language and declared the same to be a penalty. This construction is arrived at by a consideration of the whole instrument and the surroundings and therefrom deducing an intention of the parties to regard the sum reserved as a penalty. While the courts declare that it is the intention of the parties which governs, and thereby disregard express language, in reality the rule of construction is adopted to prevent injustice, relieve from hardships, and deny right to enforce an unconscionable and inequitable agreement. *Caesar v. Robinson*, 71 App. Div. 180 (182), 75 N. Y. Supp. 544.

### ARTICLE XIII.

#### DOUBLE, TREBLE, AND INCREASED DAMAGES.

The Code uses the terms "double damages," "treble damages," and "increased damages."

Double damages are twice the amount of actual damages. *Warren v. Doolittle*, 5 Cow. 678 (687).

Treble damages are three times the actual damages. *King v. Havens*, 25 Wend. 420.

"Increased damages," so-called, are referred to under section 1901 of the Code, where it is provided that in actions brought for suing in the name of another, the person whose name was used may recover his actual damages and \$250 in addition thereto.

By section 1184, it is provided that where double, treble, or other increased damages are given by statute, single damages only are to be found by the jury unless a different rule is prescribed by statute, and that the sum so found must be increased by the court and judgment rendered accordingly.

By subdivision 3 of section 708, a person who willfully conceals or withholds property liable to attachment under certain circumstances is liable to double damages.

Treble damages are provided for by section 125, as against a sheriff or other officer, who violates certain provisions of the article in which it is contained.

Section 863, that a person arrested contrary to the preceding



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 Art. 13. Double, Treble, and Increased Damages.
 

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provisions of the title of which the section is a part shall be liable to the plaintiff in treble damages.

Sections 1655 and 1658 provide for treble damages in an action for waste.

Section 1668, that treble damages may be recovered in certain actions for cutting down trees, etc., and section 1669, that like damages may be had if a person is ejected from real property in a forcible manner or is held and kept out by force, or by putting him in fear of personal violence.

Section 1901 gives treble damages in an action for suing in the name of another where the action is brought by the adverse party.

Under section 3257, increased damages do not carry increased costs.

In *Prignitz v. McTiernan*, 18 Misc. Rep. 651, 43 N. Y. Supp. 974, it was held that treble damages could be recovered where the defendant unlawfully and willfully destroyed plaintiff's property, citing Penal Code, § 654; *Livingston v. Platner*, 1 Cow. 175; *King v. Havens*, 25 Wend. 420; *Jermain v. Booth*, 1 Den. 639. It is held in the opinion, per Dunmore, J., that the rule seems to be well settled that unless it appears from the record that a single value alone was found, it will be presumed that treble value was found. Citing authorities.

Query: Whether this is the rule under section 1184 of the Code, see *McCruden v. Rochester Ry. Co.*, 5 Misc. Rep. 59, 25 N. Y. Supp. 114.

Where the waste complained of is the result of neglect to repair, rather than tortious conduct, the landlord in an action against his tenant cannot recover treble damages. *Danzigar v. Silberthan*, 21 Civ. Proc. 283.

A plaintiff is not entitled to recover treble damages where his complaint is not limited to a claim for damages under the statute giving treble damages, but imposes another and distinct cause of action. *Van Deusen v. Young*, 29 N. Y. 9 (34), citing *Mooers v. Allen*, 2 Wend. 247; *Benton v. Dale*, 1 Cow. 160.

When treble damages are allowed under the provisions of the Code in an action for cutting trees, etc., is considered and the authorities cited in *Fiero on Special Actions*, 577.

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 Art. 14. Damages against Joint Tort Feasors.
 

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**ARTICLE XIV.****DAMAGES AGAINST JOINT TORT FEASORS.**

The extent of individual participation in, or of expected benefit from a wrong by a joint tort feasor is immaterial; each and all of the tort feasors are liable for the entire damage. 1 Sutherland on Damages, 211; *Knickerbacker v. Colver*, 8 Cow. 111; *Williams v. Sheldon*, 10 Wend. 654; *Ball v. Loomis*, 29 N. Y. 412.

Parties who are jointly and severally liable for damages cannot by any arrangement between themselves prejudice the rights of the injured party as to the prosecution of the wrongdoers. *Dyett v. Hymen*, 129 N. Y. 351 (356).

It is said that in an action against joint wrongdoers, the bad motives of some of the defendants will not be imputed to the others, and, therefore, exemplary damages cannot be recovered unless all of the defendants acted so as to become liable therefor. Hale on Damages, 208, citing Sutherland on Damages, § 407.

"All who contribute to a tort, even by their wills alone, especially, therefore, all who contribute by their acts, even though in an inferior degree, are, whether they are personally present or absent at the doing, liable to the person injured, each for the entire damage, and cannot be apportioned." Bishop on Non-Contract Law, § 522.

Wrongdoers cannot maintain suit to enforce contribution. *Peck v. Ellis*, 2 Johns. Ch. 131.

But injury being joint, and a recovery against one being for all the damages supposed to have been sustained, the satisfaction of a judgment against one is complete satisfaction. Cooley Elements of Torts, 39; *Livingston v. Bishop*, 1 Johns. 290; *Lord v. Tiffany*, 98 N. Y. 412.

If one of several persons liable for a wrong is proceeded against separately, and compelled to make reparation, the law will give him no assistance in securing contribution from the others. Cooley on Torts, 42; *Merryweather v. Nixan*, 8 T. R. 186; *Covenentry v. Barton*, 17 Johns. 142.

Where a party if sued separately could not be made liable for exemplary damages, except upon the ground of some wrongdoing upon his own part, then he should not be liable for such damages when sued jointly. Opinion Learned, J., dissenting in *Reid v.*

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 Art. 15. New Trial for Insufficient or Excessive Damages.
 

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*Terwilliger*, 42 Hun, 310; s. c., 116 N. Y. 530, opinion Folger, J. See "Joint Tort Feasors," chaps. IV, VI.

### ARTICLE XV.

#### NEW TRIAL FOR INSUFFICIENT OR EXCESSIVE DAMAGES.

"I should be sorry to say," observes Lord Mansfield, "that in cases of personal torts, no new trial should ever be granted for damages which manifestly show the jury to have been actuated by passion, partiality, or prejudice. But it is not to be done without very strong grounds, indeed, and such as carry internal evidence of intemperance in the minds of the jury." Addison on Torts, 1199.

A verdict on the question of damages is conclusive, unless there is reason to believe that the jury has been misled by passion or prejudice, or governed by some improper influence, or disregarded the law. *Minick v. City of Troy*, 19 Hun, 253; *Kiff v. Youmans*, 20 Hun, 123.

The discretion of the court in setting aside a verdict as excessive must be exercised within the latitude fixed by rules and precedents. *Quirk v. Siegel-Cooper Co.*, 26 Misc. Rep. 244, 56 N. Y. Supp. 49, affirmed in 43 App. Div. 464, 60 N. Y. Supp. 228.

It is said in *McDonald v. Walter*, 40 N. Y. 551, "A verdict for a grossly inadequate amount stands upon no higher ground in legal principle, nor in the rules of law or justice, than a verdict for an excessive or extravagant amount. It is doubtless true that instances of the former occur less frequently, because it is less frequently possible to make it clearly appear that the jury have grossly erred. But when the case does plainly show such a result, justice as plainly forbids that the plaintiff should be denied what is his due, as that the defendant should pay what he ought not to be charged."

This case, with others, is cited and followed in *Morrissey v. Westchester Electric R. Co.*, 30 App. Div. 424, 51 N. Y. Supp. 945.

In *Crane v. Bennett*, 77 App. Div. 102, 79 N. Y. Supp. 66, a verdict of \$40,000 was held to be excessive and reduced by the Appellate Division to \$25,000.

In *Leavitt on Negligence*, at p. 769, will be found memorandum of authorities as to verdicts claimed to be insufficient or excessive and set aside or upheld.

## PART II.

### INJURIES TO THE PERSON.

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#### CHAPTER VIII.

##### ABDUCTION OF CHILDREN.

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#### ARTICLE I.

##### ELEMENTS OF THE WRONG.

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##### SUBDIVISION 1.

##### Early Rule — Predicated on Loss of Services.

An action lies by a parent for the abducting, enticement, or wrongful harboring of a child, as well as for its seduction. Hale on Torts, 272.

Bigelow on Torts (7th ed.), § 256, states: "It is doubtful whether any action lies by a parent for the mere enticing away of his minor daughter (or son), or for harboring the child after notice that the harboring is without the parent's consent." Citing *Taylor v. Neri*, 1 Esp. 386.

In *Magee v. Holland*, 3 Dutch. (N. J.) 86, decided in 1858, it was held: "The law seems to be now settled that the father cannot recover damages for the abduction of his children; the uniform language of the cases being, that he can only sustain an action on the case where there has been actually or constructively a loss of service.

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 Art. 1. Elements of the Wrong.
 

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"Injuries that may be offered to a person considered in the relation of a parent were likewise of two kinds: 1. Abduction, or taking his children away; and 2. Marrying his son and heir without the father's consent." 3 Bl. Comm. 140.

"It has been disputed, but the better opinion is, that the father has an interest in his legitimate child, sufficient to enable him to support an action in that character for taking the child away, he being entitled to the custody of it." 3 Bl. Comm. 140, note. Citing Cro. Eliz. 770; 23 Vin. 451; 2 P. Wms. 116; 3 Co. 38; 5 East, 221.

But, adds the note: "No modern instance, however, of such action can be adduced; and it is now usual for the father to bring his action for any injury done to his child, as for debauching her, or beating him or her, in the character of master."

"As to the other, of abduction, or taking away the children from the father, that is also a matter of doubt, whether it be a civil injury or no." 3 Bl. Comm. 140.

The rights of parents are in substance thus stated in Bishop on Non-Contract Law, §§ 373, 374: "A minor child is ordinarily in legal contemplation his father's servant, but he is not necessarily such. The law invests the father with a right to the services of his minor children, male and female, while he supports them. Therefore, one who entices such a child away \* \* \* is liable to him in damages." Citing *Butterfield v. Ashley*, 2 Gray, § 374.

### SUBDIVISION 2.

#### Ancient Doctrine Criticised — Modern Rule.

The evils resulting from founding an action upon a fictitious loss of services are made clear by the action for abduction. The real injury is to the parent's right of custody, society, and affection of the child; and to the normal parental sense there must always appear to be a grotesque, not to say inhuman quibble, in basing the recovery upon right of services.

It should be noticed, moreover, that the reasons which support the fiction of service in an action for seduction of a daughter do not here obtain. It is probable that the courts have adhered to the necessity of showing services in seduction, because in such cases the parties are, to some degree, *in pari delicto*. This objection does not exist in an action of enticement of a young child, or in the case of forcible abduction of any minor.

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 Art. 1. Elements of the Wrong.
 

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As might be expected, the tendency of modern decisions has been to get rid of the fiction in this action.

Of the foundation of the action the court, in *Kirkpatrick v. Lockhart*, 2 Brev. (S. C.) 276, says: "In truth and justice it (the fictitious loss of service) forms no essential ingredient in the cause of action and is unworthy of the notice of an enlightened and feeling judicatory. We are, therefore, of opinion there is no necessity to resort to this absurd fiction to support an action so well founded in justice, reason, and policy. The true ground of action cannot be the loss of service, for a child may be of an age so tender or of a constitution so delicate as to be incapable of rendering any service. The true ground of action is the outrage and deprivation; the injury the father sustains in the loss of his child; the insult offered to his feelings; the heart-rending agony he must suffer in the destruction of his dearest hopes, and the irreparable loss of that comfort and society which may be the only solace of his declining age."

"A father has a right of action against every person who knowingly and wittingly interrupts the relation subsisting between himself and his child, by enticing or abducting such child away from him, or by harboring the child after he has left the father's house. The action lies also on behalf of the mother after the father's death or on behalf of one standing *in loco parentis*. The gist of the action for the abduction of a child would seem to be not the loss of service, but the loss to the parent of the comfort and society of the child, though the authorities are not in harmony upon the question." 1 Am. & Eng. Encyc. of Law (2d ed.), 167, 168.

The injury which one may suffer in the relation of parent seems, at the common law, to be limited to an action for the recovery of damages for being deprived of the child's services. The action is, therefore, planted rather upon a loss in the character of the master of a servant than in that of the head of a family. This sometimes leads to results which are extraordinary, for it seems to follow, as a necessary consequence, that if the child, from want of maturity or other cause, is incapable of rendering service, the parent can suffer no pecuniary injury, and, therefore, can maintain no action when the child is abducted or injured. Such have been the decisions." Cooley on Torts (2d ed.), 268, citing *Hall v. Hollander*, 7 D. & Ry. 133; s. c., 4 B. & C. 660; *Eager v.*

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*Grimwood*, 1 W., H. & G. 61; *Grinnell v. Wells*, 7 M. & G. 1033; 8 Scott N. R. 741. In the last case it was intimated that if the abduction was of a helpless child there can be no action, because the child is incapable of performing services. The doctrine is criticised by Cooley, who doubts its soundness, saying that the services of a child, no more than those of a wife, are to be estimated by their merely physical and gross standard; they do not consist in the hewing of wood and drawing of water merely, but they are such returns of affection as the child in his condition is capable of; and many a parent has been made to feel that these, in the case of afflicted and helpless children, are often beyond all estimate.

Criticising *Hall v. Hollender*, 4 B. & C. 460, Webb's Pollock on Torts, at p. 282, says: "But this case does not show that, if a jury chose to find that a very young child was capable of service, their verdict would be disturbed."

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REMEDIES.

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SUBDIVISION 1.

The Criminal Action.

The criminal action for abduction is provided for by section 282 of the Penal Code.

As to facts necessary to be shown to prove the crime, see *People v. Plath*, 100 N. Y. 590.

SUBDIVISION 2.

The Civil Action.

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§ 1. **When the civil action lies.**—Of the right to a civil action for abduction, the court, in *Lawyer v. Fritcher*, 130 N. Y. 239, says: "It is well settled that he who unlawfully interferes with

## Art. 2. Remedies.

another's right of service, whether it be the service of a male or female, a minor, or an adult, is liable for actual or compensatory damages in the same manner and upon the same grounds that he would be liable for an unlawful interference with any other property right of another."

Further the court said: "It is true the complaint charged debauchment and ill-health as a consequence, as well as the taking of the servant from the master. Whether the debauchment was proven or not, the taking away by the defendant was proven without any contradiction, and this gave plaintiff a cause of action and a right to damages. In such cases the jury have the right to impose punitive damages in their discretion in addition to compensatory damages." *Lawyer v. Fritcher*, 130 N. Y. 239. In this case the defendant, a married man, by fraudulently representing to the plaintiff that he had a legal right to marry, obtained from the plaintiff consent to his marriage with the daughter of the plaintiff, and took her from her father's home and seduced her.

In *Cowdin v. Wright*, 24 Wend. 428, which was an action by a mother for assault and battery on her son, the court said: "The foundation of the action is the loss of service and the expense and trouble the parent is subjected to in taking care of his child." *Held*, that in this action the jury were authorized to take into account the wounded feelings of the parent; that the action was different from the action of seduction, which is *sui generis*. An action lies by a parent against one who by his acts and influence brings about a desertion of a minor child from the control and custody of such parent. *McCarthy v. Bogardus*, 17 Week. Dig. 436.

The action lies for forcibly abducting the child. *McGee v. Hillard*, 27 N. J. 86.

In *Sargent v. Mattheson*, 38 N. H. 54, it was held that if one gives protection and shelter to a child, with a view or intent of enabling or encouraging him to keep away from his father, or with the knowledge that it aided or encouraged him to keep away, this would be wrongful and actionable conduct.

In *Lipe v. Eisenlord*, 32 N. Y. 233, which was an action for seduction, the court said: "Any illegal act by which the right of a father, such as it was, to her services, was interfered with, to his detriment, was a legal wrong for which the law affords redress."

In *Kirkpatrick v. Lockhart*, 2 Brev. (S. C.) 276, it was held



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that an action was maintainable in trespass *vi et armis* for the abduction of the plaintiff's daughter. And this even though the declaration did not allege that the plaintiff lost the services of his child thereby, and although there was no evidence of a forcible taking.

An action may be maintained by a parent for the enticing away of a child whether the child be male or female. *Sherwood v. Hall*, 3 Sumn. 127; *Bundy v. Dodson*, 28 Ind. 295; *Everett v. Sherfey*, 1 Iowa, 356; *Stowe v. Heywood*, 7 Allen, 118.

In *Bradley v. Shaffer*, 64 Hun, 430, 19 N. Y. Supp. 604, the action was for wrongfully and maliciously enticing plaintiff's daughter from the home of her parents to the home of defendant, and there keeping her under the control of defendant against the wish and consent of the plaintiff. The wrong was aggravated in that the daughter was seduced by the plaintiff's son in the home of defendant, with the knowledge of defendant. The verdict was reversed, however, upon the ground that the complaint had been improperly amended so as to allow a joint judgment against defendant's husband.

§ 2. **When the civil action does not lie.**—In *Nash v. Douglass*, 12 Abb. Pr. (N. S.) 187, an action was brought against an officer of the Children's Aid Society, asking that he be adjudged to return the plaintiff's son, and to pay \$1,000 damages for depriving the plaintiff of his son's society, aid, etc. It was shown that the Aid Society was deceived by the false representations of the son, who gave a false name, and pretended that he was an orphan. *Held*, that the action would not lie, and the fact that the defendant failed to make inquiries as to the truth of the statements of the boy was not material, as such inquiries would have been fruitless. It was further held that offer of travel and new homes held out by the Aid Society was not an unlawful enticement or solicitation. Speaking of the nature of the action the court said: "Within well-accepted principles, it is necessary, in an action of this character, that the enticing away and harboring of the child should be willful, and with notice or knowledge of the fact that the child has parents or guardians, whose rights are thus invaded. Without such notice or knowledge, an essential element of the wrongful enticement, known to the law, is wanting. The principle involved, either as to the question of pleading, evidence, or judicial determination, is elementary. The words 'en-

## Art. 2. Remedies.

tice,' 'solicit,' 'persuade,' or 'procure,' as used in the pleadings in an action, and acted upon by the courts, have been well defined; they import an initial, active, and wrongful effort."

In *Rising v. Dodge*, 2 Duer, 42, it was held that a father cannot maintain an action against the defendant for removing an infant child under a writ of *habeas corpus*, where it appeared that he had not the absolute right to its custody and that the child was incapable of rendering services of value.

Though the defendant knew that the boy was the son of plaintiff and a minor, yet if there was an honest belief on the part of the defendant, that the youth had left his father's service with the father's consent, the defendant is not liable to the plaintiff. It was material and important for the defendant to show any fact which would convince the jury that he had acted honestly. *Caughey v. Smith*, 47 N. Y. 249.

As to whether a minor over the age of eighteen years may enlist in military service without the consent of his father, and for the decisions on both sides of the question, see *Caughey v. Smith*, 47 N. Y. 259, note.

Where a father, separated from his wife, allows his son to live with the wife, and the son ships for a voyage at sea, the father cannot, by forbidding the master to take his son, maintain an action against the shipowner. *Wodell v. Coggeshall*, 2 Metc. 89.

Speaking of the right of action for employing and harboring a child, the court, in *Hopf v. U. S. Baking Co.*, 6 Misc. Rep. 158, 21 N. Y. Supp. 217, says: "There can be no doubt but that the plaintiff was entitled to the care and control of his son, to enjoy his society, and have the benefit of his earnings. And when he found the son in defendant's employ, he had the undoubted right to demand his discharge from that employment; and if defendant persisted in keeping the boy, intending to deprive the father of his society and the exercise of parental authority, it committed a wrong, for which the parent has a right of action for such damage as he sustains in consequence of the tort. \* \* \* It is also equally true that the father may consent to the employment of his minor son, and when he so consents, no action for harboring him will lie, although he is thereby deprived of his society, custody, and control." It was held that the parent could not occupy two positions — to maintain an action for wages of the boy and also an action for harboring. Having elected to sue for the wages he could not maintain an action in tort for harboring.

## ARTICLE III.

## PLEADING, EVIDENCE, ETC.

In an action by a parent for enticing away a child it should be alleged that the defendant knew of the relationship. *Butterfield v. Ashley*, 6 Cush. 249.

Both in an action for enticing away a minor child and for harboring one who has deserted his father's service, it is essential to aver and prove knowledge on part of the defendant that the minor owed services to the plaintiff. *Caughey v. Smith*, 47 N. Y. 249. (Note.— This is the ancient doctrine repudiated in many jurisdictions. There is no late satisfactory authority in New York.)

In *Caughey v. Smith*, 47 N. Y. 249, where the plaintiff's son was a lad of fifteen years, and it was shown that the father did not emancipate him nor consent to his leaving his service, and where the defendant knew from the appearance of the youth that he was a minor and that the plaintiff was his father, held, that he was chargeable with the legal inference that the plaintiff was entitled to the custody, labor, and services of the boy.

In an action upon the case for enticing and harboring apprentices, it must be shown that the defendant knew that they were apprentices of the plaintiff. *Stuart v. Simpson*, 1 Wend. 377, citing 2 Chit. Pl. 269, note y; Stark. Ev. 1310–11; *Fores v. Wilson*, Peake's N. P. Cas. 55.

The annotator to the last case cites *James v. LeRoy*, 6 Johns. 274, to the contrary. The latter case, however, is not in tort, but to recover for work, labor, and services performed by the plaintiff's apprentices.

Where there is testimony tending to show that the defendant had knowledge that the plaintiff's son had wrongfully left his father's house, the question is one of fact for the jury.

It is the right of the defendant that the jury should be instructed that the plaintiff could not recover unless it appeared from the testimony that the defendant knew that the minor had wrongfully deserted his father's service. *Caughey v. Smith*, 47 N. Y. 249.

## Art. 3. Reading, Evidence, etc.

## FORMS.

**Complaint — Abduction by Fraud, Aggravated by Seduction and Suicide.**

## SUPREME COURT — SCHOHARIE COUNTY.

PETER LAWYER, Plaintiff,

*agst.*

PETER G. FRITCHER, Defendant.

Complaint, 130 N. Y. 239.

The plaintiff, complaining of the defendant, alleges:

*First.* That at the time hereinafter mentioned one Edith Lawyer was the servant and daughter of the plaintiff, and that the defendant was a married man, and that his wife was then living to the knowledge of the defendant, and from whom he had never been divorced.

*Second.* That on or about the 16th day of May, 1886, at the town of Richmondville, in said county, the defendant, well knowing that he had no right to marry or contract marriage with any one, falsely and wickedly stated and represented to plaintiff and his said daughter, Edith Lawyer, that he was free and clear from his said wife and had a right to marry again, and offered and proposed marriage to said Edith Lawyer, and the said defendant, well knowing that she, the said Edith Lawyer, was the servant and daughter of said plaintiff, and wrongfully contriving and intending to injure the plaintiff and deprive him of her assistance and services, did wickedly and maliciously, and without the privity or procurement of the plaintiff, entice and persuade the said Edith Lawyer to leave the residence and service of the plaintiff and accompany him to Portlandville, Otsego county, N. Y., and then and on or about the 17th day of May, 1886, as plaintiff is informed and believes, pretended to marry the said Edith Lawyer, and to have and read to her a certificate of such marriage, and represented her to others as his wife, and did then and there debauch and carnally know the said Edith Lawyer, greatly injuring her and causing her great pain and suffering.

*Third.* The plaintiff, upon information and belief, further alleges that, by reason of the foregoing premises, the said Edith Lawyer was taken and kept away from home, became sick and sore, suffered great pain and was unable to and did not attend to the duties of her service, and the plaintiff was thereby deprived of her services, and was put to expense and was otherwise greatly injured, and the said Edith Lawyer, on learning soon thereafter that her marriage was void and was a sham and a deceit, and that defendant had no right to marry, and could not, and had deceived, outraged, and ruined her, became depressed, suffered great mental anguish, was gloomy and

## Art. 4. Damages.

distracted, and sought self-destruction, procured and took poison, and, after suffering great agony, died on or about the 20th of May, 1886, at the house of defendant, where defendant had taken her for purposes of prostitution, to plaintiff's great sorrow and disgrace, and, by reason of the above and foregoing, to his great injury, and to his damage of five thousand dollars.

WHEREFORE, Plaintiff demands judgment against the defendant for five thousand dollars, besides costs of this action.

(Verification.)

ALBERT BAKER,  
*Plaintiff's Attorney.*

**Answer Alleging Consent and Connivance.**

**SUPREME COURT — SCHOHARIE COUNTY.**

PETER LAWYER

*aget.*

PETER G. FRITCHER.

Answer, 130 N. Y. 239.

The defendant for an answer to plaintiff's complaint herein:

*First.* Denies each and every allegation in said complaint not hereinafter admitted or otherwise specially stated.

*Second.* The defendant admits that he is a married man; that his wife is living, and that he has no divorce from her.

*Third.* The defendant admits that the Edith Lawyer mentioned in the complaint was the reputed daughter of the plaintiff, and that she died on or about the 20th of May, 1886, at defendant's house.

*Fourth.* The defendant denies that plaintiff has suffered any damage from any act or procurement of his; and that whatever occurred between defendant and the said plaintiff's daughter Edith was with the full knowledge and consent of the plaintiff.

WHEREFORE, Defendant demands that plaintiff's complaint be dismissed, with costs.

(Verification.)

A. B. COONS,  
*Defendant's Attorney.*

**ARTICLE IV.**

**DAMAGES.**

As in regard to the fiction of services, so in regard to the right to punitive damages, there is a conflict between the old and the late authorities.

In *Covert v. Grey*, 34 How. Pr. 450, in an action on the case

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Art. 4. Damages.

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to recover damages for enticing plaintiff's son from his service, and inducing him to enlist in the army as a substitute for the defendant, it was held that punitive or exemplary damages could not be recovered; that the foundation of the action was loss of services, and that a recovery should be for actual damage sustained. *Balcom, J.*, dissents.

It was further held that damages could only be recovered up to the time of the commencement of the action, or, at the most, to the time of the trial. Note that the rule here applied as to prospective damages is different from that existing in negligence cases, etc., by which the plaintiff's child is injured. In such cases the plaintiff is permitted to recover for prospective loss of services.

In *Whitney v. Hitchcock*, 4 Den. 461, where the action was for assault and battery on a child, the servant of the plaintiff, held, that the measure of damages was the actual loss, and that exemplary damages could not be given, even though the assault was of an indecent character.

It seems that, where the action is brought for willfully and maliciously enticing the plaintiff's daughter from the house of her parent, that the damage may be aggravated by the fact that the daughter, when in the house of defendant, was seduced by defendant's son, if the defendant connived thereat and aided in bringing about the seduction. *Bradley v. Shafer*, 64 Hun, 431, 19 N. Y. Supp. 604.

In *Hopf v. United States Baking Co.*, 48 St. Rep. 729, 21 N. Y. Supp. 589, an action was brought for wrongfully harboring plaintiff's son and depriving him of his services. Upon trial it was shown that the plaintiff had consented to the employment, and demanded his son's wages. *Held*, after a reversal of judgment in plaintiff's favor, that the complaint could be amended upon terms to allow a recovery for the wages.

But the more recent case of *Lawyer v. Fritcher*, 130 N. Y. 239, settles the right to punitive damages. Though the case was aggravated by debauchment, the court held that the proving thereof was not necessary, and, the abduction being shown, there was a right to damages, and punitive damages, in the discretion of the jury.

## CHAPTER IX.

### SEDUCTION.

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#### ARTICLE I.

##### DEFINITIONS AND DISTINCTIONS.

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##### SUBDIVISION 1.

###### Definitions.

Seduction is the act of a man enticing a woman to commit unlawful sexual intercourse with him by means of persuasion, solicitation, promises, bribes, or other means, without the employment of force. Black's Law Dict. 1074.

Seduction is thus defined in *Ayer v. Colegrove*, 81 Hun, 322: "Seduction is the act of the man in inducing the woman to permit unlawful sexual intercourse with him. Thus it may be accomplished by the use of seductive arts, such as flattery, solicitations, importunity, and promises."

In *Hogan v. Creagan*, 6 Robt. 138, the court attempts to distinguish between the wrong when accomplished by arts and wiles — that is to say, seduction; and when accomplished by force, that is to say, rape. But the technical meaning of the word "seduc-

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 Art. 1. Definitions and Distinctions.
 

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tion " includes, also, the commerce obtained by force, as was held in *Damon v. Moore*, 5 Lans. 454.

In section 3343 of the Code of Civil Procedure, subdivision 9, seduction is included among " personal injuries."

### SUBDIVISION 2.

#### Seduction Distinguished from Analogous Wrongs.

In *Lawyer v. Fritcher*, 130 N. Y. 239, it was held that one who interferes with another's right to the services of a third person, whether male or female, minor or adult, is liable for actual or compensatory damages, the same as he would be liable for any unlawful interference with any other property right. This case is most valuable in pointing out the distinction between actions for interference with the parent's rights for services, independent of the question of seduction. Any interference with such rights, resulting in loss of services, is ground for action; seduction is not essential.

Though there is a radical difference between the action for seduction and breach of promise to marry, yet, in the latter action, seduction by means of promise to marry may be shown in aggravation of damages. *Wells v. Padgett*, 8 Barb. 323.

One of the distinctions between an action for breach of promise to marry and for seduction is pointed out in *Hamilton v. Lomax*, 26 Barb. 615, 6 Abb. Pr. 142, where it was stated that the infancy of the defendant is a defense in an action for breach of promise to marry. The court said: " So careful have the courts been to keep these causes of action separate, that in a case of seduction it was held erroneous to admit evidence of a promise of marriage in attempting to prove the seduction."

Another distinction is at once seen by the fact that the action for seduction cannot be brought by the person seduced, while, on the contrary, in an action for breach of promise to marry, the action is brought by the party to the contract.

Perhaps the chief distinguishing feature between criminal conversation and seduction is that the former is brought by the husband or wife to recover for the real injury; that is to say, for an injury to the marital rights; while seduction, on the contrary, is brought by the parent or guardian upon the fiction of injury to the right to service.



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 Art. 1. Definitions and Distinctions.
 

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## SUBDIVISION 3.

## Historical: Theory of the Action.

At common law either trespass or case might be brought, and the plaintiff had his election. Case was in all actions the proper remedy. In England trespass *vi et armis* seems to have predominated. Yet the right to bring case, laying the injury with a *per quod servitium amisit*, has there not only been judicially recognized, but very able writers upon the English law treat this as the most proper form. \* \* \* Where the seduction is accompanied with actual violence upon the person of the daughter, or an illegal entry upon the plaintiff's close, or into his house, probably trespass would lie for the assault. *Moran v. Dawes*, 4 Cow. 413.

Criticising the legal theory of the action, Savage, J., in *Clark v. Fitch*, 2 Wend. 459, says: "It is true indeed, and pity 'tis, 'tis true, that the action is founded technically upon the supposed loss of service alone, the father and daughter being considered as standing in the relation of master and servant; yet it is perfectly well known that the actual loss of services constitutes very little or no part of the real ground of the action. The largest verdicts are often and most generally given in cases where the daughter rendered no real service to the parent. The action is supported, not so much to remunerate in damages for the loss of service and expenses incurred, as to punish the offender for his dishonorable and disgraceful conduct."

At common law it would seem that trespass on the case for seduction was founded upon the expenditure of money and loss of services consequent upon the seduction, and hence that the action could not be sustained unless pregnancy followed, or loss of health and consequential loss of services. Though trespass could be maintained at common law where the defendant illegally entered the plaintiff's house and debauched his daughter, the debauching being proved in aggravation of damages, even though not followed by pregnancy. The illegal entry was the gist of the action, and the loss of services merely consequential. In such cases, therefore, if the trespass is not proven the plaintiff could not recover. *Sargent v. Blank*, 5 Cow. 106, citing 3 Bl. 143; 2 Ld. Raym. 1032; *Ben-nett v. Alcott*, 2 T. R. 168.

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 Art. 1. Definitions and Distinctions.
 

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A person seduced cannot bring an action for the seduction. The only mode in which such an action has ever been maintained has been by bringing the action in the name of some person having a right to the services of the person seduced, allowing damages not only for the actual loss of services, but also for a sum sufficient to punish the seducer. *Hamilton v. Lomax*, 26 Barb. 615, 6 Abb. Pr. 142.

Criticising the theory of the action, Mason, J., in *Badgley v. Decker*, 44 Barb. 577, said: "All the modern cases hold that the legal gravamen of the action is not the real gravamen, as is apparent when we come to consider the rule of damages in the action, and judges have not infrequently spoken of the action as resting upon a fiction. \* \* \* The real gravamen of the action is not the loss of services. \* \* \* Even where the loss of services is small, the highest damages are given. The real gravamen of the action is the mortification and disgrace of the family and the wounded feelings of the plaintiff."

Cooley (on Torts [2d ed.], 268) says: The action is, therefore, planted rather upon a loss in the character of the master of a servant than in that of the head of a family.

In *Shufelt v. Rowley*, 4 Cow. 58, the plaintiff claimed costs in the Supreme Court because the action was for trespass, assaulting the plaintiff's daughter and getting her with child. The court said: "This is not technically the action of assault and battery. The gist of the action is loss of services \* \* \* and thus the plaintiff is entitled to Common Pleas costs only."

The absurdity of the common-law theory of the action is thus criticised in *Ellington v. Ellington*, 47 Miss. 329: "That system of jurisprudence which punishes in damages the slightest aggression upon property, but denies redress to the father, and if he be dead, to the mother, for the defilement of an infant daughter, except upon a predicate of a loss of services, is at variance with the sentiments and conscience of this age."

For a recent case where the action was allowed by a female ward against her guardian, and which marks a point of departure from the strict common-law rule, see *Graham v. Wallace*, 50 App. Div. 101, 63 N. Y. Supp. 372.

## Art. 2. Remedies.

## ARTICLE II.

## REMEDIES.

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## SUBDIVISION 1.

## The Criminal Action.

In addition to the civil actions for damages, the subject of this chapter — "Seduction" — under some circumstances may be punished as a crime; but not all seductions are criminal.

A criminal action lies in this State only where the seduction is accomplished under a promise of marriage. In such cases an express promise, at least upon the part of the defendant, must be shown. The mutual promise on the woman's part may be inferred. *People v. Kane*, 14 Abb. Pr. 15.

In the criminal action it must be shown that the seduction was accomplished (1) under promise of marriage; (2) that the female was previously chaste, and (3) no conviction can take place upon the testimony of the seduced unsupported by other evidence. *People v. Lomax*, 6 Abb. Pr. 139.

The criminal action is provided for by Penal Code, § 284, as follows: "A person who, under promise of marriage, seduces and has sexual intercourse with an unmarried female of previous chaste character, is punishable by imprisonment for not more than five years, or by a fine of not more than one thousand dollars, or by both."

§ 285. *Subsequent marriage*.— The subsequent intermarriage of the parties, or the lapse of two years after the commission of the offense before the finding of an indictment, is a bar to a prosecution for a violation of the last section.

§ 286. *No conviction on certain testimony*.— No conviction can be had for the offense specified in section 284 upon the testimony of the female seduced, unsupported by other evidence.

As far as the criminal action under the statute is concerned, merely having sexual intercourse with a female does not constitute seduction. In seduction the defendant must use insinuating arts to overcome the opposition of the seduced. *People v. Gumaer*, 4 App. Div. 412, 39 N. Y. Supp. 326.

## Art. 2. Remedies.

In a criminal action the promise of marriage which is necessary must be absolute, unconditional promise; thus a promise to marry the woman if she is made pregnant will not support a conviction. *People v. Ryan*, 63 App. Div. 429, 71 N. Y. Supp. 527; *People v. Van Alstyne*, 144 N. Y. 361; *People v. Duryea*, 81 Hun, 390, 30 N. Y. Supp. 877.

## SUBDIVISION 2.

## Civil Action.

By Code of Civil Procedure, § 2863, justices of the peace cannot take cognizance of a civil action to recover damages for a seduction. As to the jurisdiction of the New York Municipal Court, City Court of Albany, and Troy Justices' Court, see title "Jurisdiction" in Assault and Battery; Code Civ. Proc., §§ 2863, 3215, 3223.

By subdivision 1 of section 384 of the Code of Civil Procedure, an action for seduction must be brought within two years.

It has been held, in a criminal action under the statute, that a woman can be seduced but once, and the statute of limitations begins to run from the first act of voluntary intercourse committed by her after she is fully able to understand its nature and enormity. *People v. Nelson*, 153 N. Y. 90, reversing 91 Hun, 634.

The executors or administrators of a deceased father or master cannot maintain an action for seduction in the father's lifetime of his daughter or servant. These causes of action are purely personal and like assault, libel, and slander, die with the person. *George v. Van Horn*, 9 Barb. 523.

Moak's Underhill on Torts, 345, states that, where death is caused by the seduction, probably no action could be maintained on the ground that "*actio personalis moritur cum persona*," citing *Osborn v. Gillett*, L. R., 8 Exch. 88. But attention is called to the fact that, in the common-law action for seduction, the daughter is not a party, and it is difficult to see how her death can affect the action. Attention is called to the case of *Lawyer v. Fritcher*, 54 Hun, 586, 28 St. Rep. 221, 7 N. Y. Supp. 909, affirmed in 130 N. Y. 239, where an action was allowed the father after the daughter committed suicide after the seduction; the question of abatement of the action does not there seem to have been raised.

Though there is no decision upon the point in this State, it

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 Art. 3. Elements of the Wrong.
 

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would seem that if the seduction resulted in the death of the woman, no action would lie by her executor or administrator to recover damages for the wrongful act, under section 1902 of the Code of Civil Procedure, as such an action is only authorized in such cases where the defendant would have been "liable to an action in favor of the decedent by reason thereof if death had not ensued." As is seen, the action may be maintained by the father independently of the statute, even though the daughter be dead. It would seem, however, that if it were a case of assault, coupled with rape, an action would lie by the executrix, for in that case the decedent might have sued.

By section 1910 of the Code of Civil Procedure any claim or demand can be transferred, except \* \* \* (1) where it is to recover damages for personal injury \* \* \* . As seduction is defined as a personal injury by section 3343 of the Code, subdivision 9, such claim or demand cannot be transferred.

A parent may recover for the injury done to him, for the loss of services and expenses of confinement of the daughter, although she was not virtuous, unless he connived at or knew of her criminal intercourse. The loss of services and expenses of confinement are the ground of the action. *Ackeraley v. Haines*, 2 Cai. 292.

In some jurisdictions, it may be shown that other persons had intercourse with the woman previous to the seduction. *Eager v. Grimwood*, 1 Exch. 61; *White v. Murtland*, 71 Ill. 250.

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#### SUBDIVISION 1.

##### The Seduction.

It has been held that the consent of the daughter to the intercourse is no defense to an action brought by the parent, as his loss of service is the same in either case, though the consent may be shown in mitigation of damages. *Damon v. Moore*, 5 Lans. 454, distinguishing *Higgins v. Creagan*, 6 Robt. 128. See, further, "Defenses," art. IV; "Consent."

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 Art. 3. Elements of the Wrong.
 

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It is immaterial whether the defendant accomplish his purpose by artifice and persuasion or by force. Where it is shown that the daughter is debauched without the father's consent, resulting in a loss of services, the gist of the action is made out. *Lawrence v. Spence*, 99 N. Y. 669, affirming 29 Hun, 169. This in effect overrules the *dictum* that seduction must be accomplished without force, as expressed in *Hogan v. Creagan*, 6 Robt. 138.

It is no defense to show that the illicit connection was obtained by force and without the consent of the daughter. *Lawrence v. Spence*, 29 Hun, 169, Learned, J., dissenting.

Though the connection was accomplished by force and against the will of the woman, the action of seduction lies, nevertheless. In such cases, unlike an action for assault and battery on a child, when brought by the parent, exemplary damages may be recovered. The court said: "The injury to the parent in these cases is the same. The disgrace and wounded feelings are the same, when accomplished by insinuating arts, wiles, and strategy, and persuasion. He abuses the simplicity and confidence of the victim, without force, or by art and force combined, or by force alone. I think the action can be maintained and exemplary damages recovered, whether the injury is inflicted within or without the technical meaning of what may be called seduction." *Damon v. Moore*, 5 Lans. 454, disapproving *Hogan v. Creagan*, 6 Robt. 131.

The stricter English cases hold that the seduction must be followed by pregnancy or disease to warrant a recovery. See *Eager v. Grimwood*, 1 Exch. 61. But the modern doctrine, on the whole, tends to sustain the action whether followed by pregnancy or disease or not, if injury to the health can be shown which would interfere with services. For example, if it became necessary for the plaintiff to send his daughter away for recovery. *Abraham v. Kidney*, 104 Mass. 222. But the loss of health must be the proximate and necessary effect of the seduction; as, for example, where the illness is brought on by distress of mind; or by the fact that the defendant abandoned the woman. *Boyle v. Brandon*, 13 M. & W. 738.

Neither pregnancy nor disease is essential to the maintenance of a parent's action for seduction. *Leloup v. Eschause*, 2 City Ct. 55.

In *Ingerson v. Miller*, 47 Barb. 47, it was held that mere seduction, without pregnancy, ill-health, or injury to the servant, will

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Art. 3. Elements of the Wrong.

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not give a right of action. But where pregnancy and consequent incapacity from physical exercise follows the wrongful act, the technical requirements of the law in regard to the actual injury to the master's rights are established.

Where the daughter, after the seduction, committed suicide, but was not at her father's house or in his actual service when she died, it was held not to be a defense to prevent recovery. *Lawyer v. Fritcher*, 54 Hun, 586, 28 St. Rep. 221, 7 N. Y. Supp. 909, affirmed in 130 N. Y. 239. It was further held that the jury were warranted in inferring that the suicide was caused by shame and mortification; that it was induced by the seduction, and constituted an injury to the father, for which damages were recoverable.

An early Connecticut case holds that the action might be maintained by a father against one who enticed his minor daughter from his service and procured her to be married to another person; the marriage had been annulled by the legislature for fraud. *Hills v. Hobert*, 2 Root, 48, decided in 1793.

But it has been denied in Massachusetts that such an action would lie. The court said: "The law of marriage entirely overrides the general principles of right of the parent to the services of the child, or the duties from one to the other as servant and master, by allowing the female child to terminate it at any moment after she arrives at the age of twelve years, by uniting herself to some one in marriage." *Hervey v. Mosemey*, 7 Gray, 479.

In *Moran v. Dawes*, 4 Cow. 412, where the action was brought by the mother, the court said: "The relation of mistress and servant between the plaintiff and her daughter was sufficiently made out. The slightest acts of service are sufficient, as merely milking the cows. So it is said making tea for, or attention to, the plaintiff, during sickness." Citing 2 Phill. Ev. 157. "Mr. Phillips very judiciously remarks that otherwise the action might be confined to families in the lower ranks of life, where the daughter is literally a servant, and could never be extended to the higher order, where it is generally more wanted."

Speaking of the gist of the action, the court says: "Neither the injury to the person of the child, nor the property of the plaintiff, are, in truth, ever taken into account. They are little more than a mere fiction, adopted in order to sustain the remedy by trespass. The direct injury may be waived in all cases, and the declaration framed to meet the consequential injury, disregarding entirely

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Art. 3. Elements of the Wrong.

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every consideration except the loss of service, and the more important one of seduction and disgrace."

In *Ingersoll v. Jones*, 5 Barb. 661, it was held that the right to maintain the action depends, not upon the relation of parent and child, but upon the relation of master and servant, and it seems the court will look beyond the relation which actually exists for the purposing of inquiring which of the relations are maintained. *Held*, therefore, that where the woman's father is dead, and she lived in the plaintiff's family, who had taken her to bring her up and was treated by him as one of his own children, that, for the purpose of prosecuting the suit, the plaintiff stood *in loco parentis*, and could maintain the action even though the woman's mother was alive. And this, also, even if, at the time of the seduction, she was out at service in another family with the plaintiff's consent.

In *Hewitt v. Pruyn*, 21 Wend. 79, it was held that an action could be maintained by the father without proving any actual loss of services. It was enough that the daughter, a minor, resides with her father, and that he had a right to claim her services.

The earlier and stricter cases have proceeded upon the theory that, in order to recover, there must be ability on the part of the woman to render services at the time of the seduction (*Hall v. Hollinger*, 4 B. & C. 660), though the action lies whether these services were actually rendered or not, and the amount of services has nothing to do with the case.

In *Ingerson v. Miller*, 47 Barb. 47, it was held that this action is founded on the relation of master and servant, and loss of services and actual injury to the plaintiff's right as master must be averred and proven. That the action is not maintainable upon the mere relation of parent and child, and proof of the slightest loss of services, or of the most trivial injury, is sufficient. Nor is it an objection that no actual loss of services is proven. It is sufficient if the father was at the time entitled to the services of the daughter, and might have required them had he chosen to do so. In this case, the daughter had lived with her father, except when employed as a school teacher under a contract made by him.

In *Mulvehall v. Millward*, 11 N. Y. 343, the court sustains the right of action on behalf of the father for the seduction of a minor daughter, though in the service of the defendant at the time. *Dean v. Peel*, 5 East, 45, is cited and limited. *Held*, it is not



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 Art. 3. Elements of the Wrong.
 

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requisite that the minor daughter should be actually in the service of or residing with her father at the time of the seduction, to entitle him to maintain the action. It is sufficient that he is legally entitled to her services, and might have required them if he chose to do so. Note that in this case the daughter did not return to her father until after confinement and recovery therefrom, and there was no proof that he took care of or expended anything upon her account during her sickness.

A widowed mother, whose minor daughter is actually in her service at the time of the seduction, may maintain the action, even though she is home rendering temporary services and subsequently returns to her own employment. *Gray v. Burland*, 51 N. Y. 424, affirming 50 Barb. 100.

*Mulvehall v. Millward*, 11 N. Y. 343, is commented on in Rodgers on Domestic Relations, § 838, note. Criticising *Dean v. Peel*, 5 East, 45, on which these actions are founded, the latter says: "The case stands alone and has received severe and, it is believed, just and proper criticism in this country. \* \* \* The author has found but a single English case denying a right to recover."

### SUBDIVISION 2.

#### Loss of Services.

The loss of services and the right to services are, in theory, a vital ingredient of the cause of action. Reference is, therefore, made to the article "Parties," since the matter of parties plaintiff in this action has an exceptional importance. Attention is also called to the peculiar case of *Graham v. Wallace*, 50 App. Div. 101, 63 N. Y. Supp. 372.

A right to the services of the person seduced is essential to the maintenance of the action. *Hamilton v. Lomax*, 26 Barb. 615, 6 Abb. Pr. 142.

*Dain v. Wyckoff*, reversed in 7 N. Y. 191, and a new trial granted, on the ground that the plaintiff, having indentured his daughter to the defendant, was not entitled to her services, was again before the Court of Appeals in 18 N. Y. 46. On the second trial, the plaintiff proceeded upon the theory that the defendant had employed the daughter for the purposes of seduction, and it was shown that he had made advances to her about a week before the indenture of apprenticeship. *Held*, proof that the defendant procured the indenture as a means of effecting the seduction was an

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Art. 3. Elements of the Wrong.

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answer to the objection that the plaintiff was not entitled to the services. The court, however, says that the evidence on this point was so suspicious that it deems a new trial ought to have been granted by the court, but that the Court of Appeals, having power only to correct errors of law, must affirm the judgment.

The intention of an infant daughter not to return to her father's house is no defense where she does in fact return to him and is cared for. *Martin v. Payne*, 9 Johns. 387.

The action is founded upon the loss of services, and thus, to maintain it, there must be actual or constructive relation of master and servant; if a constructive relation, the master must have the right to command the woman's services at his pleasure. The constructive relation exists between a father and his infant daughter, even though the latter is in the actual service of another, if the father can reclaim her services at any time. A stepfather, however, is not entitled to the services of his stepdaughter, and no action lies by him for the seduction of the woman while in the service of another, even though she returns to her stepfather's house and is there cared for prior to the birth of the child. *Bartley v. Richtmeyer*, 4 N. Y. 38. The prior authorities on seduction collated and considered.

In *Furman v. Van Sise*, 56 N. Y. 435, it was held that, after the death of the father, the mother could bring the action for seduction of her daughter while in the employ of another person under an agreement made by the mother, even though the daughter received pay for her services and applied it to her own use with the consent of the mother, who cared for her during her confinement. The decision limiting *Bartley v. Richtmeyer*, 4 N. Y. 38, is founded upon the theory that the mother, after the death of the father, is entitled to the control of the services of the child during her minority, and because 1 R. S. 614, § 1, casts upon the mother the burden of supporting an indigent child. Allen and Folger, JJ., dissenting.

Where a father allowed his daughter, aged nineteen, to live with and work for her uncle, it was held that an action for seduction lay on behalf of the father, for he did not divest himself of his authority to reclaim his daughter. She was his servant *de jure*, though not *de facto*, at the time of the injury. *Martin v. Payne*, 9 Johns. 387.

But if the daughter is over twenty-one years of age, the father cannot maintain the action, although his daughter is with child,

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unless she is actually in her father's service, so as to constitute the relation of master and servant in fact. *Nickelson v. Stryker*, 10 Johns. 115.

Where there is a doubt whether the woman's services belong to her father or to the defendant, it is a question for the jury. *Lipe v. Eisenlerd*, 32 N. Y. 229.

In *Knight v. Wilcox*, 14 N. Y. 413, reversing 15 Barb. 279, the pendulum again swings and the court holds the rule that the loss of service must be direct and immediate in all its strictness. In this case the action was brought by a father. The daughter was not made pregnant by the intercourse, though she had been made ill for a week or more, and was unable to work about the house through worry from the grief of her parents and fear of exposure. *Held*, that an action was not maintainable; that the foundation would be his loss of services; that the wrongful act must be the natural and direct cause of the injury for which damages are sought, and the damages the proximate consequence. That, where there is no pregnancy or illness of mind or body incident to the wrongful act, nor did the intercourse affect the mental or physical health of the daughter for nearly three months after the act complained of, and not until the fact became known, that the illness occasioned was not the natural and proximate consequence of the defendant's act, but was occasioned by the parents themselves, and that the plaintiff should have been nonsuited. Distinguished in *White v. Nellis*, 31 N. Y. 408.

Though the seduction must result in the loss of services, whenever the act, by immediate and direct consequences, deprives the master (parent) of the services, or injuriously affects his legal rights to such services, the action lies. So held in a case where, while there was no pregnancy, a venereal disease was communicated by the defendant. The court said: "The ordinary consequences that affect the master are pregnancy and lying-in of the servant. \* \* \* But it by no means follows that there is no remedy where the loss of services is the direct effect of the wrongful act, although produced by some other cause." *White v. Nellis*, 31 N. Y. 405.

In *Lampman v. Hammond*, 3 T. & C. 294, the court said: "The father may maintain the action for the seduction of his minor daughter upon the presumption, without proof, of a loss of service, because he is entitled to command such service." Holding also right of mother to maintain action.

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In *Lipe v. Eisenlerd*, 32 N. Y. 229, it was held that an action lay by a father for the seduction of his adult daughter, where the latter was supplied by the father with food and clothing, and the relation of master and servant existed, even though the daughter was temporarily absent at the time of the seduction, and there was no express contract for services between her and her father. The court states that it considers the fact that the daughter was at the defendant's house at the time of the seduction merely in the nature of a visit not affecting the relation between plaintiff and his daughter. See *Lawyer v. Fritcher*, 130 N. Y. 239.

**SUBDIVISION 3.****Effect of Age of Woman.**

The rule in actions of seduction as modified by the minority of the woman is thus determined in *Millar v. Thompson*, 1 Wend. 448: "The action will not lie where the woman is over the age of twenty-one years unless she be in the actual service of the plaintiff so as to constitute in law and in fact the relation of master and servant. But if the woman be under the age she is assumed to be under the control and protection of her parent, so as to enable him to bring the action whether she actually resides with him or not. If she is above the age of twenty-one and resides with her seducer at the time of the seduction no action lies." The same rule was followed in *Clark v. Fitch*, 2 Wend. 460, where it was held that the father, liable for the expenses of the lying-in of the daughter seduced, within the age of twenty-one, could maintain an action on the case for the seduction, even though the daughter is the servant *de facto* of another, and even though the father had relinquished all claim to services and had incurred no actual expenses." The theory is that the father may at pleasure revoke such license, recall his daughter and control her services, and having such a right the relation of master and servant exists.

The fact of the minority of the person seduced is considered in *George v. Van Horn*, 9 Barb. 523. It was said that if the daughter be of age she must be in the father's service so as to constitute in law and in fact the relation of master and servant in order to entitle the father to sue for seduction. If she be under age she is presumed to be under his control and direction so as to entitle him to the action, whether she actually resides with him or not. Citing *Nickelson v. Stryker*, 10 Johns. 120; *Millar v. Thompson*, 1 Wend.

## Art. 4. Defenses.

448; *Moran v. Dawes*, 4 Cow. 412; *Sergeant v. Blank*, 5 Cow. 106; *Bartley v. Richtmeyer*, 2 Barb. 182; *Ingersoll v. Jones*, 5 Barb. 661.

Where the woman seduced is over twenty-one years of age and lives with her parents, the relation of master and servant may be inferred from very slight services performed by the child, and although there may be no express agreement for services between them. *Badgley v. Decker*, 44 Barb. 577.

A person having the right to the services of the woman seduced may maintain the action; even though the woman is a minor. *Hamilton v. Lomax*, 26 Barb. 615, 6 Abb. Pr. 142.

A father entitled to the services of his adult daughter by tacit understanding between them may have an action for her seduction. *Lipe v. Eisenlerd*, 32 N. Y. 229.

## ARTICLE IV.

## DEFENSES.

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## SUBDIVISION 1.

## Connivance of Plaintiff.

The fact that the plaintiff knew of the improper intercourse between the defendant and his daughter when it took place, and did not interfere to prevent it, is a complete defense. So, too, if he connived at the intercourse and assented thereto after it came to his knowledge. *Travis v. Barger*, 24 Barb. 614.

Where the plaintiff (parent) consents and connives at the criminal intercourse an action does not lie. In cases of this nature the daughter is supposed to be violated with force and against the will and consent of the father. *Held*, further, that a local custom for young people who are courting to sleep together is no excuse for the parent who permits it. The court said: "If it furnishes an excuse for his carelessness or his daughter's dishonor, it is some apology also for the defendant \* \* \* He (the father) knew the risks to which his daughter was exposed." *Seagar v. Sliger-sand*, 2 Cai. 219.

## Art. 4. Defenses.

This case stands among the *curiosa* of early local customs in America, known as "Bundling."

Where the consent of the parent to the marriage of his daughter to defendant, who had a wife living, was obtained by false representations of the defendant, such consent is void and furnishes no defense in an action by the parent for damages resulting from the loss of services. *Lawyer v. Fritcher*, 130 N. Y. 239, affirming 59 Hun, 536.

Where the plaintiff must have known that the course of conduct allowed by him between his daughter and the defendant was such as to unquestionably terminate in seduction, he is not entitled to damages therefor. *Fletcher v. Randall*, Anthon's N. P. 196; *Graham v. Smith*, 1 Edm. S. C. 267.

In *Reddie v. Scoolt*, Peake, 240, where the plaintiff had permitted the defendant to visit his daughter as a suitor, after notice that he was a married man and a libertine,—*Held*, that there could be no recovery for the subsequent seduction.

Compare cases under "Criminal Conversation;" "Defenses;" "Consent," and "Connivance of Husband."

## SUBDIVISION 2.

## As to Consent of Woman.

2 Hilliard on Torts, 601, states: "It is not competent for the defendant to show that the daughter consented willingly to the seduction or even in fact that she seduced the defendant, her consent not depriving the plaintiff of his right of action." Citing *McAulay v. Birkhead*, 13 Ired. 28.

In *Akerley v. Haines*, 2 Cai. 292, it was held that it was no defense to show that the daughter was unchaste unless the father has connived at her criminal intercourse. "The daughter not being virtuous is no reason why the father \* \* \* should not recover for the injury done to him by the loss of her services and the expenses of her confinement. These were the grounds of the action."

In *Jackson v. Brown*, 74 Hun, 25, 57 St. Rep. 272, 26 N. Y. Supp. 156, it was held that the complaint in an action for seduction may properly be united with another cause of action to set aside a release of such action obtained by fraud.

A written agreement by the woman seduced, not to hold the defendant liable for damages, is no defense in an action by the parent for seduction. See *Travis v. Barger*, 24 Barb. 614.

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 Art. 5. Parties.
 

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**SUBDIVISION 3.****Miscellaneous.**

An offer to marry the woman seduced is no defense, nor can it be shown in mitigation of damages. *Ingersoll v. Jones*, 5 Barb. 661.

A subsequent marriage between the woman and the defendant, and the acquittal of the defendant on indictment for seduction, do not furnish a complete defense to the action when brought by the father, but they may go in mitigation of damages. *Eichar v. Kistler*, 14 Pa. 282. See also "Evidence — Offer of Marriage."

For cases involving the bad character of the woman, for chastity or otherwise, see cases collated under "Evidence — Character of Woman."

**ARTICLE V.****PARTIES.**

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**SUBDIVISION 1.****The Woman Seduced.**

The action for seduction can never be maintained in the name of the party seduced. *Hamilton v. Lomax*, 26 Barb. 615, 6 Abb. Pr. 142. See, however, *Graham v. Wallace*, *post*.

In *Getzelson v. Bernstein*, 15 Misc. Rep. 627, 37 N. Y. Supp. 220, 72 St. Rep. 799, it was held that the woman seduced cannot maintain a civil action for that cause; that she could only maintain an action when rape has been committed upon her, and that action is given to her by statute. See *Koenig v. Nott*, 8 Abb. 384-388.

Though no action lies in the absence of statute permitting it by the woman seduced, yet the woman may have an action for assault and battery and may show an attempt to take indecent liberties in aggravation of damages. *Ford v. Jones*, 62 Barb. 484.

One of the few cases in which the woman has been allowed to maintain the action for seduction in her own name is that of *Graham v. Wallace*, 50 App. Div. 101, 97 St. Rep. 372, 63 N. Y. Supp. 372, where a female ward, on reaching her majority, was allowed to maintain the action against her general guardian of

## Art. 5. Parties.

her person and property to recover damages for her seduction while under the age of consent and a member of his household. The court said: "There being no parent or master to bring the action, if the ward may not maintain it no one else can, and the guardian, into whose custody and control the court delivered the infant, may claim and exercise the privilege of seducing his ward without becoming responsible to the infant in a civil action for damages for the wrong and injury. We find the action without precedent. There appears to be no recorded case expressly affirming or expressly negating the right of a ward to recover damages for seduction committed by the guardian of her person."

The court then says: "At common law \* \* \* in the absence of a statute removing the disability, a female could not sue to recover damages for her seduction, although her parent or master might." The court states that the rule is founded upon the maxims: *In pari delicto potior est conditio defendentis*, and also *volenti not fit injuria*. The court then cites *Smith v. Richards*, 29 Conn. 232, as authority, stating that there are and should be exceptions to this rule, in which case the court allowed a recovery on a note given by the defendant in settlement of an action for seduction. The court in considering whether an action would lie throws the blame on the fiduciary nature of the guardianship, and cites *Bratton v. Canaday*, 96 Ind. 266, where the complaint was sustained in an action by the ward against her guardian for breach of trust in negligently permitting her seduction by his son after he himself had corrupted her morals. *Held*, that the ward could recover in such an action. The court further states that this has long been settled that where a woman has been seduced under promise of marriage, the doctrine *in pari delicto* cannot be invoked to defeat her action for damages, citing *Wells v. Padgett*, 8 Barb. 325; *Sheahan v. Barry*, 27 Mich. 217; *Cooley on Torts*, 510-512. The court decides it to be its duty to make reasonable exceptions to general rules and to apply legal principles to new cases as they arise. Thus the seduction of the ward by the guardian was not merely the breach of a duty, but the violation of a legal obligation assumed by him, and it may properly be deemed a legal wrong. He should not be permitted to avail himself of the maxim *volenti non fit injuria*.

A case somewhat similar is *Dean v. Raplee*, 145 N. Y. 319, where the action was maintained by the girl against the defendant,



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in whose house she lived, for indecent assault. The case proceeds upon the theory that the action was for assault, and that it was necessary to prove, and was proved by a preponderance of evidence, that the plaintiff did not consent to the intercourse.

It is evident that an action would lie by a woman in any case where she has been criminally assaulted against her will, either treating the action as a bare action of assault, aggravated by forced sexual intercourse, or as a civil action for the rape itself. Such cases proceed upon the theory that there is no question of *pari delicto* or consent. See also *Young v. Johnson*, 46 Hun, 164, affirmed in 123 N. Y. 226.

It is said in some cases that an action lies on the part of the woman seduced, where the seduction was effected under a promise of marriage, which is subsequently broken. Bigelow on Torts (7th ed.), 270, states, "but the action is then for the breach of the promise of marriage and not for the seduction." The distinction is logical, the seduction merely being in aggravation of damage.

**SUBDIVISION 2.****Parents.**

In *George v. Van Horn*, 9 Barb. 523, where the seduction occurred during the lifetime of the father, who subsequently died without bringing the action, it was stated that the mother could not bring the action where the daughter was upwards of twenty-one years of age and in the actual service of another person at the time of the seduction, and the father was then alive. The relation of master and servant did not exist either actually or by construction.

In *Badgley v. Decker*, 44 Barb. 577, it was held that although the mother could not maintain an action for the seduction of her daughter at common law, if the father was alive, yet that the Married Woman's Act enabled her to bring the action where the husband had abandoned her and his family and resided in another State, and the wife was engaged in business upon her own account.

The mother may bring an action for the seduction of her minor daughter where the father is dead, and she is entitled to the services and wages of the daughter. *Damon v. Moore*, 5 Lans. 454.

If the father is dead the mother has right to the services of the minor child. Hence she may maintain an action for the seduction of the daughter. This even if, at the time of the seduction, the daughter happened to be temporarily in the employ of another

## Art. 5. Parties.

person with the assent of the mother. The court said: "She was virtually, although constructively, in the mother's service while thus earning her support, subject to her commands as a parent and as her natural guardian and protectress. The old English doctrine to the contrary considered and disapproved. *Gray v. Durland*, 50 Barb. 10, Hogeboom, J., dissenting; decision affirmed in 51 N. Y. 424.

In *Sargent v. Blank*, 5 Cow. 106, where a widow bound her daughter as an apprentice, who was seduced, and thereupon the indenture canceled by consent and the daughter returned to her mother's house and lay in there, it was held that an action on the case lay at the suit of the mother.

Where the minor daughter is living with her mother after her father's death, and performs services for her mother, the latter is entitled to maintain an action for seduction. The fact that the plaintiff, since the decease of her former husband, has remarried, does not change the rule. *Lampman v. Hannan*, 3 T. & C. 293.

In *Clark v. Fitch*, 2 Wend. 459, the objection was made that the nominal plaintiff, the father, had never in fact instituted the suit; but the court held that this was not a matter of inquiry upon the trial, and that if he sanctioned the suit, though commenced without his orders he has a right to do so, and if he disapproves of it, the proper course to put an end to it is by motion. The attorney is responsible for any improper use of the plaintiff's name.

## SUBDIVISION 3.

## Those in Loco Parentis.

"This action is maintainable where the father is deceased by any one who stands *in loco parentis*, as by a mother or aunt." Reeves' Domestic Relations, 293; 2 Kent Comm. 205.

Though a stepfather has not the rights of a parent by virtue of that relation, yet if he adopts the illegitimate child of his wife and she is brought up by him, he stands *in loco parentis* and can maintain an action for her seduction. *Bracy v. Kibbee*, 31 Barb. 273.

A stepfather cannot maintain an action for the seduction of his stepchild, who is seduced while in the service of another person, even though she returns to his house before the birth of the child and there engages in service and is there attended during confinement. *Bartley v. Richtmeyer*, 4 N. Y. 38.

A grandfather who assumes the obligations of a parent to an

## Art. 6. Pleading.

infant female at the request of her deceased parent, can maintain the action for her seduction, although she is living away from him in the service of the defendant at the time thereof, and appropriates her wages to her own use. *Certwell v. Hoyt*, 6 Hun, 575, Merwin, J., dissenting.

The right is sustained in the following cases: *Manvell v. Thompson*, 2 C. & P. 303 (an action by an aunt); *Bracy v. Kibbee*, 31 Barb. 273 (an action by stepfather); *Irwin v. Deerman*, 11 East, 23 (an action by foster-father).

The cases where relief has been denied to the parent upon the ground that by contract or otherwise some other person was entitled to the daughter's services have not generally admitted that the action for seduction should be brought by such other person as master; so it may be said that in all cases where the female is employed by some person who may bring the action, unless the employer himself is liable, no action lies. See *Edmondson v. Machell*, 2 T. R. 4; *Bennett v. Alcott*, 2 T. R. 166; *Manvell v. Thompson*, 2 C. & P. 303.

In theory this is all very well; but an evil of the fiction which is the basis of the action is shown by the fact that where the master, not a parent, sues for the seduction of a servant, and recovers, the recovery is paid to and owned by him. Neither the woman nor her parents, who suffered by the wrong, are entitled to any portion of it.

## ARTICLE VI.

## PLEADING.

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## SUBDIVISION 1.

## Complaint.

In the plaintiff's declaration at common law he is not required to allege or prove that the defendant knew that the female was the daughter or servant of the plaintiff. 2 Chit. Pl. 263, note.

If the complaint alleges mutual promises of marriage and the breach thereof by the defendant, allegations of seduction are merely in aggravation of damages, and do not constitute an independent cause of action. *Getzelson v. Burnstein*, 15 Misc. Rep. 627, 37 N. Y. Supp. 220, 72 St. Rep. 799.

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A complaint in an action for seduction may properly unite another cause of action, which seeks to set aside a release of an action for seduction, alleging that such release was obtained by fraud. *Jackson v. Brown*, 74 Hun, 25, 57 St. Rep. 272, 26 N. Y. Supp. 156.

## SUBDIVISION 2.

## Answer.

In order to prove connivance and that the plaintiff did not interfere to prevent the seduction, the defense must be alleged, because it furnishes a complete bar to the plaintiff's action. However, matters which, not being a complete defense, only go in mitigation of damages may be shown without being pleaded. *Travis v. Barger*, 24 Barb. 614 (before the Code Civ. Proc.).

The previous unchastity of the woman may be shown under a general denial where no claim for punitive damages is made, and the evidence is interposed merely to reduce actual damage. *Wandell v. Edwards*, 25 Hun, 498.

## FORMS.

## Seduction Without Force.

## SUPREME COURT — RENSSELAER COUNTY.

JAMES LAWRENCE

agst.

GEORGE SPENCE.

Complaint, 99 N. Y. 689.

The above-named plaintiff complains against the said defendant, and respectfully shows to the court:

That at the times hereinafter mentioned one Mary Lawrence was the servant and the daughter of the plaintiff, and was and is an infant under the age of twenty-one years, to wit, of the age of twenty-one years on the 9th day of September, 1879.

That during the month of August, 1878, and from time to time thereafter, until the last of January, 1879, the said defendant did wickedly, willfully, and maliciously, and without the privity or con-

## Art. 6. Pleading.

sent of the plaintiff, debauch and carnally know the said Mary Lawrence.

That by reason of the premises the said Mary Lawrence became pregnant and sick with child, and so remained for a space of about nine months, at which time she was delivered of a female child, which is still living. That during two months of the time of pregnancy of the said Mary Lawrence, before she was delivered of said child, she was unable to attend to the duties of her service, and the said plaintiff was deprived of her services and earnings, and in consequence thereof has since been deprived of her earnings and services, and was otherwise greatly injured, to his damage \$5,000.

WHEREFORE, the plaintiff demands judgment against the defendant for \$5,000 and costs.

HENRY A. MERRIT,  
*Plaintiff's Attorney.*

## Complaint by Mother.

## SUPREME COURT — SUFFOLK COUNTY.

PHEBE FURMAN

*agst.*

JEREMIAH VAN SISE.

Complaint, 56 N. Y. 435.

The plaintiff complains of the defendant and says:

*First.* That at the several times hereinafter mentioned, the plaintiff was the mother of and entitled to the services of one Sarah E. Fleet.

*Second.* That at the several times hereinafter mentioned the father of said Sarah E. Fleet was deceased.

*Third.* That on or about the 16th day of May, 1870, at Woodbury, Queens county, N. Y., the defendant well knowing the said Sarah E. Fleet to be the daughter of the plaintiff and wrongfully contriving and intending to injure the plaintiff of her assistance and service, did wickedly, willfully, and maliciously, and without the privity or consent of the plaintiff, then and there debauch and criminally know the said Sarah E. Fleet, she being at that time in the eighteenth year of her age.

*Fourth.* That by reason of the premises the said Sarah E. Fleet became pregnant and sick with child, and so remained for several months, during which time she was taken care of, supported, and nursed by this plaintiff; that during her said sickness and confinement she was unable to attend to the duties of her services, and the

## Art. 6. Pleading.

plaintiff was thereby deprived of her services, and was obliged to and did expend large sums of money in nursing, in bestowing labor and services, in taking care of, feeding and clothing and in providing medical attendance for said Sarah E. Fleet, and was otherwise greatly injured, to the damage of this plaintiff of \$3,000.

WHEREFORE plaintiff asks judgment against this defendant for the said sum of \$3,000, together with the costs of this action.

(Verification.)

THOMAS YOUNG,  
*Plaintiff's Attorney.*

**Complaint by Father Asking that Release be Set Aside.**

**SUPREME COURT — QUEENS COUNTY.**

ROBERT E. JACKSON

*agst.*

PIERRE M. BROWN.

Complaint, 74 Hun, 25.

The plaintiff, by this, his complaint, states and shows to the court:

I. That at the times hereinafter mentioned one Sarah M. Jackson was a minor, the servant of the plaintiff, a member of his family, and owed him services.

II. That on or about the month of May, 1891, at the town of Hempstead, in said county, the said defendant, well knowing the said Sarah M. Jackson to be the servant and member of the plaintiff's family, and wrongfully contriving and intending to injure the plaintiff and deprive him of the assistance and service of his said servant, did willfully, wickedly, and maliciously, and without the privity or consent of this plaintiff, entice and persuade the said Sarah M. Jackson to leave the service of the plaintiff, and did then and there, by persuasion and under promise of marriage, seduce and debauch his said servant, and carnally know her.

III. That by reason of the premises the said Sarah M. Jackson became pregnant and sick with child, and so remained for the space of nine months; that during that time she was unable to attend to the duties of her service, and this plaintiff was thereby deprived of her service, and was obliged to, and actually did, expend the sum of \$75 in nursing and taking care of his said servant in said pregnancy and sickness, which sum and claim upon the defendant he recognized and afterward, to wit, on the 27th of February, 1892, acknowledged and paid to this plaintiff for and on account

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Art. 6. Pleading.

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of the sickness and nursing of his said servant as aforesaid, and not otherwise; and he was otherwise greatly injured, to his damage \$5,000.

IV. For a further and separate cause of action the plaintiff shows and states that on the 27th day of February, 1892, the said defendant, by his duly authorized agent and attorney, one Adam Finck, under the pretense of paying the plaintiff for the expense and nursing during the sickness and confinement of his said servant, deceitfully and fraudulently induced this plaintiff to sign a paper writing purporting to be a release and discharge of the defendant from any and all debts, dues, due or to accrue to this plaintiff for loss of services of the said Sarah M. Jackson, his servant, during confinement, and at other times and exemplary damages therefor, which paper writing is hereto annexed and made a part of this complaint; and for the same purpose and the same fraudulent intent the said Finck, acting as aforesaid, falsely and fraudulently represented to this plaintiff and to his said servant that the said paper writing purporting to be a release, as aforesaid, was simply and only a receipt for the sum of \$75 to reimburse him for money expended by him for the sickness of his said servant and nursing her during confinement, and nothing more; that said plaintiff relying on said representations of said Finck, and believing in the truth of the same received and accepted the sum of \$75, and no more, for money expended by him, and for nursing his said servant during her said sickness and confinement, and not otherwise, and signed said paper writing, which he would not have done, but for said representations of said Finck, without knowing the contents of said paper writing, or without having the same read to him or any member of his family or other person, supposing it to be a receipt for the said sum of \$75.

WHEREFORE, the plaintiff demands judgment that the said alleged release be adjudged fraudulent and void as to the plaintiff, as to loss of services of the plaintiff for and on account of the debauching and pregnancy of the plaintiff's said servant as aforesaid, and that he recover judgment against the defendant for the sum of \$5,000 for said loss of service, for debauching his said servant and the costs of this action.

M. COMPTON,  
*Plaintiff's Attorney.*

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**Complaint by Woman Seduced Against Her Guardian.**

NOTE.—This case is *sui generis*, and an exception to the rule that the action cannot be maintained by the seduced woman. It was for this reason doubtless that the complaint is open to the

## Art. 6. Pleading.

criticism of pleading the evidence, strong equities being necessary to sustain the complaint on demurrer.

## SUPREME COURT — ONONDAGA COUNTY.

MAUD GRAHAM

*agst.*

ALVIN D. WALLACE.

} Complaint, 50 App. Div. 101.

Plaintiff, for a cause of action against defendant, alleges and respectfully shows:

That plaintiff is the daughter of Frank Graham and Jennie B. Graham, and was born at Cortland, N. Y., on the 7th of January, 1878. That after plaintiff's birth she resided with her parents at the corner of Homer avenue and Main street, Cortland, N. Y.

That on or about the 31st day of December, 1886, plaintiff's mother, Jennie B. Graham, died, leaving her surviving this plaintiff, then eight years of age, and plaintiff's father, Frank Graham, and one sister, Laetitia Graham, then ten years of age.

Plaintiff further alleges that after the death of her mother, as herein set forth, she resided with her father at the same place she had been residing, and continued to so reside with her father and attended the public schools at Cortland, N. Y., until on or about the 19th day of June, 1892, when plaintiff's father, Frank Graham, died, leaving plaintiff, then fourteen years of age, and her sister, Laetitia, then sixteen years of age, orphans.

Plaintiff further alleges that shortly after her father's death, an application was made to the Surrogate's Court of Cortland county, N. Y., for the appointment of a general guardian of this plaintiff.

Plaintiff further alleges that thereafter, and on or about the 7th day of July, 1892, an order was made and duly entered in the surrogate's office of Cortland county as follows: (Here follows order appointing defendant guardian and his qualification as such.)

Plaintiff further alleges that it was the duty of the defendant, as general guardian of the property of plaintiff, to preserve the estate left by her father and mother for this plaintiff's use and benefit, and that it was also the duty of this defendant, as general guardian of the person of this plaintiff, to properly and suitably educate her, and to surround her with good and wholesome conditions to protect her person from violence, to protect her from immoral influence and to teach her, by good example, to protect her from lust and sensuality of men, so that when she should arrive at the age of twenty-one years she would be able to hold a position in society suitable to her condition in life and be able to make a livelihood for herself. That this defendant stood "*in loco parentis*," and that he was bound in the execution of his trust, as guardian of the person of this plaintiff, to watch over



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her chastity and good character, the same as a father would, and to protect and preserve her virtue and her reputation to the fullest extent of his powers.

Plaintiff further alleges that the defendant herein, in disregard and in violation of the trust reposed in him at the time of his appointment as general guardian of the person of this plaintiff, and in violence of the duties and obligations he owed this plaintiff, at once commenced a course of action toward this plaintiff, which resulted in defendant assaulting and prostituting plaintiff to gratify his own desires.

(Here follows allegations of numerous instances of intercourse, each specifically set forth, each being stated to be "in violation of his duties as guardian," etc.)

That thereafter and on or about the 30th of January, 1899, plaintiff removed to the city of Syracuse, where she now resides; plaintiff further alleges that ever since she went to defendant's house to reside with this defendant, and ever since defendant has been her general guardian, this defendant, in violation of his duties and trust, as general guardian of her person, by a systematic and persistent endeavor succeeded in assaulting, debauching, and carnally knowing this plaintiff, and that such conduct continued on his part from the time she was of the age of fifteen years until on or about the 30th day of January, 1899.

That by reason thereof plaintiff's health has been greatly damaged; that she is not able to associate with the good and respectable society of the community where she resides; that her mind has been immorally influenced; that her body has been debauched; that she has been assaulted by this defendant, and that she is left at the age of twenty-one years, by reason of this defendant's acts, bereft of virtue, helpless and friendless, and without means of making a living.

WHEREFORE this plaintiff demands judgment against the defendant for the sum of \$25,000, besides the costs of this action.

(Verified )

THOMPSON, WOOD & SMITH,

*Attorneys for Plaintiff.*

### Answer, With Specific Denials.

#### SUPREME COURT — SUFFOLK COUNTY.

PHEBE FURMAN

*agst.*

JEREMIAH VAN SISE.

} Answer, 56 N. Y. 435.

The defendant, Jeremiah Van Sise, answering the complaint of the plaintiff:

## Art. 7. Evidence.

I. Denies that at the several times mentioned in the complaint the plaintiff was entitled to the services of one Sarah M. Fleet.

II. The defendant has no knowledge, and has not any information sufficient to form a belief whether or not at the several times mentioned in the complaint the father of said Sarah E. Fleet was deceased.

III. The defendant denies that on or about the 16th day of May, 1870, at Woodbury, Queens county, N. Y., or at any other time or place this defendant did debauch and criminally know the said Sarah E. Fleet.

IV. The defendant denies that by reason of any act of this defendant, the said Sarah E. Fleet became pregnant and sick with child, and denies that the plaintiff was thereby deprived of her services, and denies that the plaintiff was obliged to, or did expend large sums of money or any sum of money whatever, either in nursing, or in bestowing labor and services, or in taking care of, feeding and clothing, or in providing medical attendance for said Sarah E. Fleet, and denies that the plaintiff was otherwise or in any way injured.

V. The defendant says the plaintiff has been paid in full for all moneys she has expended by reason of any matters stated in the complaint.

VI. The defendant denies each and every allegation in the complaint contained, not hereinbefore specifically denied.

WHEREFORE the defendant asks that the complaint be dismissed, with costs.

(Verified.)

SMITH & STANBROUGH,  
*Defendant's Attorney.*

## ARTICLE VII.

## EVIDENCE.

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## SUBDIVISION 1.

## Of the Seduction.

The bare fact of criminal connection does not constitute seduction. To make out a cause of action it must be shown that the

## Art. 7. Evidence.

defendant used enticing arts to overcome the woman's opposition, and by wiles and persuasion, without force, debauched her. *Hogan v. Creagan*, 6 Robt. 138. Contra, *Lawrence v. Spence*, 99 N. Y. 669, holding it immaterial whether seduction is accomplished by persuasion or by force.

In an action for seduction it is competent to show circumstances under which the woman was seduced and the means used in corrupting her mind. *Bracy v. Kibbee*, 31 Barb. 273.

Continued attention to a woman for several months, followed by improper intercourse, was held to be evidence warranting an inference of seduction. *Clarke v. Fitch*, 2 Wend. 459.

A written agreement between the defendant and the plaintiff's daughter, by which the defendant admitted the seduction and agreed to pay a sum of money to the daughter, she to release him from all actions for damages, etc., is admissible in an action by the father, not to show the extent of the injury or the amount of damages, but as an admission by the defendant of the facts which the plaintiff is bound to prove to entitle him to recover. Nor is such proof objectionable on the ground that it is cumulative, nor because it might aggravate the offense. *Travis v. Barger*, 24 Barb. 614.

In *Hewitt v. Pruyn*, 21 Wend. 79, a physician was allowed to testify that he was consulted by the defendant as to the means of producing an abortion. He is not precluded from testifying under the statute forbidding disclosure of professional information received by a physician to enable him to prescribe for a patient. See, however, under § 834, rule held in *People v. Brower*, 53 Hun, 217, and *People v. Orr*, 92 Hun, 199, affirmed, on opinion below, 149 N. Y. 616.

In a criminal prosecution under the statute it was held to be error to admit evidence that the woman had a child thirteen months after the date when she charged the seduction was committed. That such evidence in no wise tended to prove the seduction as of the date stated, and that the admission of such evidence required a reversal of the judgment and a new trial. *People v. Kearney*, 110 N. Y. 188, reversing 47 Hun, 129, distinguishing *People v. Armstrong*, 70 N. Y. 30.

## SUBDIVISION 2.

## Of Right to Services.

Proof of the slightest degree of service is sufficient to establish the relation of master and servant in an action for seduction, and

## Art. 7. Evidence.

to allow an action for the recovery of the highest amount of damages. There need be no express promise to pay for such services. *Badgley v. Decker*, 44 Barb. 577.

See further cases under "Necessary Elements; Right to Services."

## SUBDIVISION 3.

## Of Character of Plaintiff, or His Connivance.

The defendant cannot prove the bad character of the plaintiff. *Dain v. Wykoff*, 7 N. Y. 192.

The bad character of the plaintiff in respect to chastity is not admissible in reduction of damages or otherwise, though it is true that damages are given for the wounded sensibilities of the parent. To justify evidence of bad reputation it must be shown that his sensibilities as a parent are less acute and the affection of a virtuous daughter are to him less valuable than to any other man. *Dain v. Wykoff*, 7 N. Y. 191. As to connivance, see "Defenses," subd. 2.

## SUBDIVISION 4.

## Of Character and Financial Standing of Defendant.

In *Dain v. Wykoff*, 7 N. Y. 192, it was held that it is improper to prove the financial standing of the defendant. The court said: "The custom at the circuit has been to admit evidence of this character, but I have not been able to discover in the elementary writers on evidence authority for this practice. \* \* \* If the defendant cannot show his poverty in mitigation of damages, there is no reason why the plaintiff should aggravate them by proof of his wealth." The statement of Alderson, B., in *Jones v. Buddington*, 6 C. & P. 589, is quoted with approval: "Such evidence has often been given, but it was improper. The plaintiff is entitled to as much damages as a jury think is a compensation for the injury he has sustained, and the amount of the defendant's property is not a question in the case."

In some jurisdictions the financial standing of the defendant may be considered in estimating damages. *Peters v. Lake*, 66 Ill. 206; *Lavery v. Crooke*, 52 Wis. 612.

In *McAulay v. Birkhead*, 13 Ired. 28, it was held that the plaintiff could prove not only the financial standing of the defendant, but the character of his own family.

**SUBDIVISION 5.****Of Character of Woman Seduced.**

It is error to exclude evidence of previous lascivious conduct on the part of the girl. One of the considerations entering into the question of damages is the supposed loss on the part of the parent of the society of a chaste and pure daughter. If, therefore, the daughter had already become impure the loss in that respect would be much less. *Bracy v. Kibbee*, 31 Barb. 273.

Specific acts of loose conduct on the woman's part may be shown to mitigate damages, but the defendant is not bound by the woman's answer to such questions on cross-examination. *Hogan v. Creagan*, 6 Robt. 138.

In *Ford v. Jones*, 62 Barb. 481, which was an action for assault and battery, aggravated by indecent liberties, it was held that the plaintiff's character was directly in issue on the question of damages, and it was competent to disparage such reputation by proving specific acts of lewdness and immorality. It is error for the court to rule that the plaintiff's character for chastity can be attacked only by proof of general reputation.

In *Kenyon v. People*, 26 N. Y. 203, a criminal action under the statute, it was held that proof of general reputation as to want of chastity was not admissible. That the statute meant actual personal virtue, not mere reputation for virtue. That the defendant would have been entitled to introduce proof of specific acts of lewdness.

Evidence of acts of intercourse by the woman with other men subsequent to the seduction, and not within a possible period of gestation are not admissible. The court said: "If she was chaste and virtuous prior to the time that the defendant accomplished her seduction and ruined her reputation, he cannot complain of her subsequent conduct, for it may well be attributed to his original wrong." It seems, however, that if the alleged intercourse had been within the period of gestation it would have been proper as tending to show that pregnancy might have occurred in consequence of such connection. *Ayer v. Colgrove*, 81 Hun, 322, 30 N. Y. Supp. 788.

In an action for seduction, which was not followed by pregnancy, or any actual loss to the plaintiff's father, it was held to be error to exclude evidence on the part of the defendant that the plaintiff's

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Art. 7. Evidence.

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daughter had stolen things from the defendant. In this case the charge against the defendant was not made by the daughter until after she had been accused of stealing from defendant. *Held*, that had the daughter been guilty of stealing, the proof thereof would probably have impaired her testimony and might have affected her standing before the jury as a witness. *Held*, further, that in an action for seduction the omission of the female to make disclosure of the intercourse promptly, militates strongly against her testimony. *Zoppi v. Smith*, 55 Hun, 547, 29 St. Rep. 251, 8 N. Y. Supp. 876.

In *Wandell v. Edwards*, 25 Hun, 498, it was held that the defendant could show, under a general denial, evidence that the seduced woman had previously had connection with another man; that the evidence was admissible in mitigation of damages, and that section 536 of the Code of Civil Procedure only required such facts to be alleged when they tended to disprove the malice and diminish punitive damages.

Where the action was founded upon the fact that the defendant had communicated a venereal disease to the woman, it was held that proof that the girl had about the same time had connection with two other persons did not show that she did not acquire the disease from the defendant, where there was some slight proof that she had symptoms of the disease before connection with the other persons. Note, however, that the appellate court was not asked to intervene in any other manner upon this ground. There seems to be an intimation that the evidence might have been offered by the defendant as showing specific acts of lewdness. *White v. Nellis*, 31 N. Y. 405.

Evidence of a woman's good character is not admissible unless her reputation is attacked. *Bracy v. Kibbee*, 31 Barb. 273.

**SUBDIVISION 6.****Of Offer of Marriage by Defendant.**

In *Ayer v. Colgrove*, 81 Hun, 322, 62 St. Rep. 751, 30 N. Y. Supp. 788, it was held that in a civil action for seduction it was competent to prove that the seduction was accomplished under a promise of marriage should the act lead to pregnancy.

The plaintiff cannot prove that the defendant made his daughter a promise of marriage with a view to increasing damages. He may, however, show that the defendant paid his daughter atten-

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Art. 7. Evidence.

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tions as are usual when the addresses are of an honorable character; and it is usual to give such evidence to show the character of the affair and that she did not readily yield to the arts of the seducer. *Brownell v. McEwen*, 5 Den. 367.

The defendant is not entitled to prove in mitigation of damages that he offered to marry the woman seduced. It seems that such evidence would be in mitigation if the law allowed the action to be brought by the woman, but it does not go in mitigation of damages to a parent. It seems, further, that had money been offered, or any other compromise, it would not be admissible in mitigation of damages. *Ingersoll v. Jones*, 5 Barb. 661.

Evidence of a promise to marry is inadmissible, and even though the judge instructs the jury not to consider damages from the breach of such promise, the verdict will be set aside if such evidence has been received. The daughter, however, may be asked whether the defendant paid his addresses in an honorable way. *Gillet v. Mead*, 7 Wend. 193.

The plaintiff is not entitled to show that the defendant made a promise of marriage to the daughter prior to the seduction, and if such evidence is admitted without qualification or limitation it is cause for reversal. *Whitney v. Elmer*, 60 Barb. 250.

The court said: "The ground of the action by the father is the loss of service by the child. \* \* \* It is manifest that whether there has been a promise of marriage, or not, is wholly immaterial to any question legally pertinent to the ground of the action, or the amount of damages sustained by the sickness. The promise of marriage, and the breach of it are the subjects of an action by the daughter. \* \* \* Of course there is a manifest danger, if such evidence is allowed to be given in an action by the father, that damages may be given in that action based to some extent upon the breach of the marriage promise."

Where the action was brought by the father, the daughter cannot prove a previous promise of marriage in aggravation of damages, because she has her own action for breach of promise. *Foster v. Scofield*, 1 Johns. 297.

In some jurisdictions the rule is that the plaintiff may show that the seduction was accompanied by breach of promise to marry, though the jury should not award the father any of the damages belonging to the daughter by reason of the breach. *Elthan v. Kennedy*, 20 Pa. St. 354.

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 Art. 8. Procedure and Trial.
 

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**SUBDIVISION 7.****Miscellaneous.**

The plaintiff may show in aggravation of damages any circumstances which are the natural consequence of the act, although they did not occur until after suit brought. *Hewitt v. Pruyn*, 21 Wend. 79.

In a criminal action under the statute the defendant's father was allowed to testify, on cross-examination, against the defendant's objection, that he gave \$100 to the overseer of the poor in bastardy proceedings. *People v. Kearney*, 47 Hun, 129, reversed on other grounds in 110 N. Y. 188.

In a criminal action under the statute it was held that testimony of a physician as to the pregnancy of a female is admissible as corroborating the alleged intercourse. That a statement of the defendant to such physician, on being informed that the woman was pregnant, that it left him in a pretty fix, was admissible. *Held*, also, that the plaintiff may show that the defendant endeavored to induce a physician to perform an abortion. *People v. Orr*, 92 Hun, 199, 36 N. Y. Supp. 398, 71 St. Rep. 169, affirmed, on opinion below, in 149 N. Y. 616.

**ARTICLE VIII.****PROCEDURE AND TRIAL.**

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**SUBDIVISION 1.****Trial — Public May be Excluded.**

By Code of Civil Procedure, § 5, the sittings of every court within this State shall be public, and every citizen may freely attend the same, except that in proceedings and trials in cases for \* \* \* seduction \* \* \* the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court.

**SUBDIVISION 2.****Charge and Nonsuit.**

It is not error to charge that the jury, in awarding damages, may take into consideration the injured feelings of the plaintiff. *Badgley v. Decker*, 44 Barb. 577.



## Art. 9. Damages.

Where the woman seduced was *enceinte* at the time of her death, *held* the court was right in refusing to dismiss the complaint upon the ground that there was no proof of loss of services. *Held*, further, under the conceded facts, this was not a question to be submitted to the jury. *Ingerson v. Miller*, 47 Barb. 47.

Where it appears that the woman seduced was at the time in the service of another, it is not improper for the judge to allow the jury to determine whether the plaintiff (the person standing *in loco parentis*) was at the time entitled to the wages. *Ingersoll v. Jones*, 5 Barb. 661.

It is error to charge that the jury should consider a promise of marriage made by the defendant prior to the seduction, not on the question of damages, but as one of the circumstances under which the seduction was affected. *Held*, further, that the defendant was entitled to have the jury instructed that the plaintiff was not entitled to any additional damage on account of the promise to marry. *Whitney v. Elmer*, 60 Barb. 250. See *Ayer v. Colgrove*, 81 Hun, 322, 30 N. Y. Supp. 788.

## SUBDIVISION 3.

## Costs.

By Code, § 2238, subd. 3, in an action to recover damages for seduction, if the plaintiff recovers less than \$50 damages, the amount of his costs cannot exceed the damages.

## ARTICLE IX.

## DAMAGES.

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## SUBDIVISION 1.

## Compensatory.

In a parent's action for seduction, damages for loss of services may be recovered up to the commencement of the action. *McCarty v. Bogardus*, 17 Week. Dig. 436.

A father can only recover the expenses incurred before his daughter was twenty-one years old, in an action for seduction. By

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Art. 9. Damages.

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taking upon himself a duty not imposed by law he cannot cast upon the defendant a burden which he would not otherwise have to bear. *Hogan v. Creagan*, 6 Robt. 138.

Speaking of allowing the evils of allowing one *in loco parentis* to bring the action, the court, in *Bartley v. Richtmeyer*, 4 N. Y. 38, says: "The money belongs to him: he is under no obligation to share it with the girl, or to do anything for her support. If such a verdict may be had in such a case, the hiring of a pregnant female into one's service will be a profitable business."

Where the action was brought after the pregnancy of the daughter, and before birth of the child, and evidence was received of loss of services and expenses incurred after the commencement of the suit, the court, nevertheless, refused to set aside a verdict where the cause of action was established independently of such evidence. The court said: "The action is altogether anomalous in its character, and the ordinary rules of evidence cannot, in all their strictness, be applied to it without defeating its essential object. No separate action could ever be maintained for the expenses and loss of service incurred after the commencement of the suit." *Stiles v. Tilford*, 10 Wend. 338.

Under the decision in *Lawyer v. Fritcher*, 130 N. Y. 239, any one who interferes with another's right to the service of a third person, whether male or female, a minor or adult, is liable for actual or compensatory damages, in the same manner as he would be liable for an unwarranted interference with any other property right of another. (In this case the taking away of the daughter by fraud.) Where under such circumstances sexual intercourse follows and loss of health and disability to service, punitive damages may be added to compensatory.

In *Sargent v. Blank*, 5 Cow. 106, it was held that damages could not be recovered for the plaintiff's bringing up of her daughter's child, the fruit of the seduction. The court said: "The plaintiff is under no legal obligation to support and educate the child, nor can she be compelled to appropriate the proceeds of this verdict for that purpose; nor will it afford the defendant any exemption from his liability to provide for the child when called upon in the regular and due course of law."

In *Hitchman v. Whitney*, 9 Hun, 512, a widow was not allowed to recover, as damages, compensation for the support of her daughter's illegitimate child, following *Sargent v. Blank*, 5 Cow. 106.

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Art. 9. Damages.

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## SUBDIVISION 2.

## Punitive.

In *Bartley v. Richtmeyer*, 4 N. Y. 38, the recovery of exemplary damages was considered. It was stated that it is well settled that a father may recover exemplary damages, and that very large, not to say outrageous verdicts, had become the fashion of the time. The court also said that such damages, in a few instances, have been allowed, where the action was not brought by the father, but that this error had not yet become so inveterate as to be beyond the reach of judicial correction. It was stated that when the action is brought by the master, not a parent, that from the obvious nature of the action he should not recover in point of principle anything more than compensation for the pecuniary loss sustained.

Where the plaintiff is the woman's father, and the person capable of receiving an injury through her dishonor, he is entitled to punitive damages whether she be an adult or a minor. The court said: "A mere master, having no capacity to be injured beyond the worth of the services lost, should undoubtedly be limited in his recovery to the value of those services." *Liye v. Eisenlerd*, 32 N. Y. 229.

Punitive damages are allowed in actions for seduction, whether suit be brought by the parents or by the person suing as master, who is not a parent. *Ingersoll v. Jones*, 5 Barb. 661. But see *supra*.

Punitive damages may be recovered where the wrong is effected by force equally as when it is effected by arts and wiles. *Damon v. Moore*, 5 Lans. 454. See *Lawrence v. Spence*, 99 N. Y. 669.

The rule allowing exemplary damages for mental suffering, etc., although the actual damage is small, is stated in *Kerns v. Hagenbuckle*, 42 St. Rep. 699, 17 N. Y. Supp. 369, where the cases on damages are collated.

Though the action for seduction can only be brought by the person having a right to the services of the person seduced, yet damages may be recovered not only for the actual loss of services, but also for a sum sufficient to punish the defendant. *Hamilton v. Lomax*, 26 Barb. 615, 6 Abb. Pr. 142.

In *Hogan v. Creagan*, 6 Robt. 138, it was held that the doctrine of exemplary damages for seduction was founded upon the desire of the courts to punish the defendant for debauching an innocent

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Art. 9. Damages.

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female; that the doctrine has no application where the connection was without the use of seductive arts, for in that case the woman is equally to blame.

**SUBDIVISION 3.****Aggravation and Mitigation of Damages.**

The defendant under a general denial may prove the unchastity of the woman in order to reduce actual damages. That the provision of section 536 of the Code of Civil Procedure, requiring a defendant to plead such facts as "tend to mitigate or otherwise reduce the plaintiff's damage," need only be pleaded when such facts tend to disprove malice, and thus diminish punitive or exemplary damages. The section does not prevent the proof, under a general denial, of facts tending to diminish actual damage. *Wandell v. Edwards*, 25 Hun, 498.

For a case holding that a subsequent offer of marriage cannot be shown in mitigation of damage, see cases collated under head of "Evidence — Subsequent Offer of Marriage by Defendant."

**SUBDIVISION 4.****Amount of Damages.**

In *Ingerson v. Miller*, 47 Barb. 47, the court refused to set aside a verdict of \$5,000, although it intimated that a smaller verdict would have been more satisfactory, in view of the financial condition of the defendant.

In *Travis v. Barger*, 24 Barb. 614, a verdict of \$3,000 was held not to be excessive.

## CHAPTER X.

### CRIMINAL CONVERSATION, ALIENATION OF AFFECTION, AND ENTICING AWAY WIFE OR HUSBAND.

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#### ARTICLE I.

##### DEFINITIONS AND DISTINCTIONS.

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##### SUBDIVISION 1.

###### Definitions.

An action for criminal conversation is an action for a personal injury. *Bennett v. Bennett*, 116 N. Y. 584.

In *Baker v. Baker*, 16 Abb. N. C. 293, the court held that an action for enticing away or criminal conversation was an action for injury to the person.

Criminal conversation is included under the term "personal injuries." Code, § 3343, subd. 9.

Speaking of the husband's marital rights at common law and his action for injury thereto, the court, in *Van Arnem v. Ayres*, 67 Barb. 545, says: "The husband at common law was entitled to the services of the wife and the comfort of her society, and any

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 Art. 1. Definitions and Distinctions.
 

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wrongful interference gave him a right of action. He might have a right of action for criminal conversation; for abduction; for enticing or harboring her. She was not supposed capable of consenting in either of these cases." The court denies the corresponding right on behalf of the wife, but was overruled in this respect by *Baker v. Baker*, 16 Abb. N. C. 293. See 116 N. Y. 587, *supra*. It is thus seen that there may be several wrongs to marital rights — that is to say — adultery; abduction; enticing away, or harboring, or injury to the consortium, the right to comfort, aid, and affection.

Speaking of the grounds for action, founded upon injury to the marital rights, Cooley on Torts (224), states that the grounds of such action is the infliction upon the husband of some one or more of the following injuries: (1) Dishonor of the marriage bed. (2) Loss of the wife's affections. (3) Loss of the comfort and wife's society. (4) Total loss of wife's services where she absconds from the husband, and probably the diminished value of services where she does not. (5) The mortification and sense of shame that most generally accompany this most serious of domestic wrongs."

## SUBDIVISION 2.

## The Wrongs Distinguished.

Though the actions for enticing away and criminal conversation are frequently treated as one action, yet there is a vital difference between the two, as shown by the decision in *Schnell v. Blohm*, 40 Hun, 378, which held that the action for criminal conversation would lie, even though the plaintiff had previously prosecuted the defendant for enticing away his wife and had recovered judgment therefor. It will be noted that the criminal conversation seems to have been committed subsequent to the enticing away. Upon this point the court said: "The enticement of a man's wife from him, and from her home and child, is a wrong of sufficient magnitude, but a fresh sting is imparted to the injury when the seducer, in the face of the world, commences an adulterous intercourse. For that new and increased wrong another action may be commenced and another judgment recovery. (3 Bl. Comm. 139.) Even if the plaintiff's former recovery had been for the seduction and debauchery of his wife, he could

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still maintain this action; for 'every moment that the wife continues absent from her husband without justifiable cause, without his consent, is a new tort, and every one who persuades her to do so does a new injury and cannot but know it.' (*Hutcheson v. Peck*, 5 Johns. 205.) The defendant injures the plaintiff anew every-day he maintains the unlawful and adulterous intercourse with his wife, and so furnishes a fresh cause of action to the plaintiff with each recurring day."

See the distinction between an action for enticing away and harboring the wife or husband, and the action for criminal conversation, in note to *Buckel v. Suss*, 28 Abb. N. C. 25, 18 N. Y. Supp. 719, affirmed on opinion below, 21 N. Y. Supp. 907.

A husband or wife may be said to have at least three marital rights; (1) to faithfulness; (2) to affection; and (3) to society. It follows that any infringement of one or more of these three rights gives rise to a cause of action, and so the actions arising out of marital rights naturally fall into three classes, viz.: (1) Criminal conversation, strictly so-called; (2) alienation of affection; (3) abduction or enticing away, by which the society of the spouse is lost. It will be seen at once that as a matter of actual fact any particular case will generally combine two or more of these distinct wrongs. However, the elements necessary to constitute each wrong, standing alone, are considered in the following pages. But it should always be borne in mind that in practical litigation the wrongs are generally combined. See, however, *Hollister v. Valentine*, 69 App. Div. 582, 75 N. Y. Supp. 115.

## SUBDIVISION 3.

## Historical, Wife's Common-law Disability Removed.

Injuries that may be offered to a person, considered as a husband, are principally three: Abduction, or taking away a man's wife; adultery, or criminal conversation with her; and beating or otherwise abusing her. (1) As to the first sort, abduction or taking her away, this may either be by fraud and persuasion, or open violence; though the law in both cases supposes force and constraint, the wife having no power to consent; and, therefore, gives a remedy by writ of ravishment or action of trespass *vi et armis, de uxore rapta et abducta*. \* \* \* And the husband is entitled to recover damages in an action on the case against such as per-

## Art. 1. Definitions and Distinctions.

suade or entice the wife to live separate from him without a sufficient cause. The old law was so strict in this point, that if one's wife missed her way upon the road, it was not lawful for another man to take her into his house, unless she was benighted and in danger of being lost or drowned; but a stranger might carry her behind him on horseback to market or to a justice of the peace for a warrant against her husband, or to the spiritual court to sue for a divorce. 3 Bl. Comm. 139.

The common-law inability of the wife to bring an action for loss of consortium or alienation of affection is discussed in *Jaynes v. Jaynes*, 39 Hun, 40, where it is said that at common law the husband and wife were regarded as one person, and thus she could bring no action for redress for injury to person or property without her husband's concurrence. Her only remedies were to sue in the ecclesiastical courts for a restitution of conjugal rights (3 Bl. Comm. 94), or, in a proper case, to proceed under the statute for a limited separation (2 R. S. 147, § 51, subd. 3), or to have her husband dealt with as a disorderly person. (1 R. S. 638.) Further, the court says: "That her disability in this respect has been removed by legislation, and holds that such action must be regarded as her 'separate and sole property.'"

The right of action on part of the wife was finally established in *Bennett v. Bennett*, 116 N. Y. 584, overruling *Van Arnam v. Ayres*, 67 Barb. 544.

The statute which enables a married woman to sue, as if sole, removed the disability which existed at common law as to actions against a third person for enticing away her husband, or depriving her of the comforts of his society. *Baker v. Baker*, 16 Abb. N. C. 293, overruling and disregarding *Lynch v. Knight*, 9 H. of L. Cas. 577; *Van Arnam v. Ayres*, 67 Barb. 544.

A wife at present is entitled to maintain an action against one who has enticed away her husband and alienated his affections. She may maintain the action in her own name. *Manwarren v. Mason*, 79 Hun, 592, 61 St. Rep. 533, 29 N. Y. Supp. 915.

An action by the wife lies for the alienation of affection, although her husband continues to live with her. *Van Olinda v. Hall*, 88 Hun, 452, 66 St. Rep. 711, 34 N. Y. Supp. 777; *Breiman v. Pasch*, 7 Abb. N. C. 249; *Warner v. Miller*, 17 Abb. N. C. 221.

In *Hodecker v. Strickler*, 20 App. Div. 245, 46 N. Y. Supp.



## Art. 2. Remedies.

808, affirming and adopting opinion below, 39 N. Y. Supp. 515, the plaintiff, a married woman, brought an action against another woman, with whom her husband was living, seeking to restrain said defendant from holding herself out as the husband's lawful wife. It was held that the complaint did not state a cause of action, nor did the facts alleged constitute the crime of false representations under section 562 of Penal Code. The complaint did not allege pecuniary damage, but it alleged that the plaintiff had been scandalized, defamed, and humiliated, etc.

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**SUBDIVISION 1.****Criminal Action.**

Adultery at common law is not an indictable offense, unless it was so open and notorious as to be a public nuisance. 1 Bishop on Criminal Law, §§ 39, 35, 501. In the United States adultery is not an indictable offense unless made a crime by statute. Such statutes exist in some States, but there is no such statute in New York. Of course, if the criminal conversation amounts to rape it would be punishable as a crime under section 278 of the Penal Code. If the enticing away amounts to kidnapping, as defined in section 211 of Penal Code, it may be punished as a crime under such section.

**SUBDIVISION 2.****Habeas Corpus.**

If the plaintiff's husband or wife, being enticed away, is imprisoned or restrained of his liberty, there is a remedy by *habeas corpus* under Code Civil Procedure, § 2015 *et seq.*

For a full treatment of *Habeas Corpus*, see 1 Fiero on Special Proceedings (2d ed.), 57 *et seq.*

## Art. 2. Remedies.

## SUBDIVISION 3.

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§ 1. **Jurisdiction.**— A justice of the peace cannot take cognizance of a civil action to recover damages for criminal conversation. Code, § 2863, subd. 3.

The courts of this State may, in their discretion, entertain jurisdiction of an action to recover damages for criminal conversation where the parties are citizens of another State, actually domiciled therein when the action was brought and tried, though the injury was committed in the State of their residence and domicile. But it seems that the Supreme Court may, in the exercise of its discretion, refuse to entertain such action, and dismiss it upon its own motion. Yet the defendant is not entitled to a dismissal, as matter of right, at the close of the trial, where want of jurisdiction has not been raised by answer, by special motion, or during trial. *Burdick v. Freeman*, 120 N. Y. 420.

§ 2. **Statute of limitations.**— The statute of limitations in action for criminal conversation is two years. Code, § 384.

In *Curry v. Gardinier*, 59 App. Div. 319, 69 N. Y. Supp. 245, 103 St. Rep. 245, the defendant pleaded the two years' statute of limitations. The complaint set out a cause of action for criminal conversation, with alienation of affection, and enticing as consequential damages. *Held*, that the two years' statute was properly pleaded; that the case did not come within the decision of *Levy v. Harris*, 29 App. Div. 453, 51 N. Y. Supp. 963, in which case two causes of action were stated, and the enticement of the plaintiff's wife was alleged, although occurring two years before the criminal conversation therein charged.

§ 3. **Survival and assignment.**— As criminal conversation is a personal action by virtue of section 3343, subdivision 9, Code of Civil Procedure, it is among the actions which cannot be transferred, under section 1910 of the Code. The action, however, does not abate on the death of plaintiff's wife, as neither of the parties to the action has died. *Yundt v. Hartrauft*, 41 Ill. 9; *Wilton v. Webster*, 7 C. & P. 198, 32 E. C. L. 491.

## ARTICLE III.

## CRIMINAL CONVERSATION; ELEMENTS OF THE WRONG.

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## SUBDIVISION 1.

*Distinguished from Alienation of Affection, etc.*

Of the action for criminal conversation Tiffany on Domestic Relations, p. 80, says: "This action does not, like the action for enticing away, harboring, or alienation of affection, rest on the loss of services of the wife, her society, or affection. But it rests upon the injury sustained by the defilement of the marriage bed, the invasion of the husband's exclusive right to marital intercourse, and the suspicion cast upon the legitimacy of offspring." Citing Reeves' Dom. Rel. (4th ed.) 90; Cooley on Torts, 324.

There is a vital distinction between the action for criminal conversation and for enticing away the wife, and a recovery for the latter will not bar a subsequent action for the criminal conversation. The court said: "The defendant injures the plaintiff anew every day he maintains the unlawful and adulterous intercourse with his wife, and so furnishes a fresh cause of action to the plaintiff with each recurring day." *Schnell v. Blohm*, 40 Hun, 378, citing 3 Bl. Comm. 139; *Hutcheson v. Peck*, 5 Johns. 205.

In *Hollister v. Valentine*, 69 App. Div. 582, 75 N. Y. Supp. 115, 109 St. Rep. 115, the complaint stated a cause of action both for criminal conversation and alienation of affection. The case, however, was submitted to the jury on the theory that it was for alienation of affection. The plaintiff appealed from the judgment rendered in his favor. *Held*, that upon such appeal he is precluded from asserting that the action was for criminal conversation, although judgment could be sustained upon that theory, but could not be sustained upon the theory on which the case was tried.

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Art. 3. Criminal Conversation; Elements of the Wrong.

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## SUBDIVISION 2.

## Formal Marriage is Necessary.

In an action for criminal conversation an actual marriage must be proved, and in these actions the cohabitation of the parties as man and wife, their declarations or admissions, the reputation of the existing marriage, or the plaintiff's acknowledgment of the woman as his wife and holding her out as such to others, and her reception in the family as such, are not sufficient to the maintenance of the suit. *Dann v. Kingdon*, 1 T. & C. 492, citing 2 Phil. Ev. 206; Cowen & Hill's Notes (782), 410; *Morris v. Miller*, 4 Burr. 2057; 2 Greenl. Ev. 49; *Fenton v. Reed*, 4 Johns. 53, 7 Johns. 314.

See also 3 Bl. Comm. 140, stating: "In this case \* \* \* a marriage in fact must be proved; though generally, in other cases, reputation and cohabitation are sufficient evidence of marriage." See also *Catherwood v. Cardin*, 13 M. & W. 361; *Campbell v. Carr*, 6 U. C. Q. B. (O. S.) 482.

The action for criminal conversation may be brought even after a divorce from the wife. *Wood v. Matthews*, 47 Iowa, 429; *Wales v. Miner*, 87 Ind. 118. But see "Defenses;" "Prior Divorce."

## SUBDIVISION 3.

## Loss of Affection or Society of Wife or Malice of Defendant not Necessary.

In an action for criminal conversation it is not necessary to show alienation of the wife's affection or loss of services, assistance, etc. These are only in aggravation of damages, and need not be shown, for the action is not based on pecuniary loss. *Tiffany on Domestic Relations*, 80.

In *Billings v. Albright*, 66 App. Div. 239, 73 N. Y. Supp. 22, 107 St. Rep. 22, it was said: "It was only necessary for the plaintiff to maintain his action (crim. con.) to prove his marriage and the criminal intercourse between his wife and the defendant, and that it was without his consent. Upon proof of these facts he was entitled to recover at least nominal damages. The gist of the action, however, is basis for substantial damages as the husband loses the consortium — the right to the conjugal society of his wife."

Thus in *Colwell v. Tinker*, 169 N. Y. 531, affirming 65 App. Div. 20, 106 St. Rep. 505, the court, in discussing malice as an ingredient of the action for criminal conversation, stated: "If

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 Art. 3. Criminal Conversation; Elements of the Wrong.
 

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there is such a thing as malice in law, and if it is ever presumed by reason of the act committed, it would seem to be in an action for criminal conversation. \* \* \* A person deliberately undertaking to destroy the marital relation is guilty of a willful, wanton act, and it is not necessary to prove that he was moved by hatred, revenge, or passion toward the husband. The law in such cases implies malice."

The court in *Bennett v. Bennett*, 116 N. Y. 591, 27 St. Rep. 679, adopts the statement in Bigelow on Torts, at p. 153: "To entice away or corrupt the mind and affection of one's consort is a civil wrong, for which the offender is liable to the injured husband or wife. The gist of the action is not the loss of assistance, but the loss of consortium of the wife or husband, under which terms are usually included the person's affection, society, or aid."

## SUBDIVISION 4.

**Consent of Wife or Ignorance of the Marriage no Defense.**

The consent of the wife is no defense to an action for criminal conversation. *Moore v. Hammond*, 119 Ind. 510; *Wales v. Miner*, 89 Ind. 118.

The fact that the defendant did not know that the woman with whom he had relations was the plaintiff's wife is no defense. He indulges in illicit intercourse at his peril, though ignorance of the marriage may be given in mitigation of damages. *Wales v. Miner*, 89 Ind. 118; *Calcraft v. Harborough*, 4 C. & P. 499, 19 Eccl. 494.

One who commits rape is liable to this action. *Egbert v. Greenwalt*, 44 Mich. 245, 6 N. W. 654; *Bigaoutee v. Paulett*, 134 Mass. 123.

## SUBDIVISION 5.

**When Wife is Plaintiff Additional Facts Must be Shown.**

Where the action for alienation of affection and criminal conversation is brought by the wife it must appear affirmatively that the defendant was the seducer and enticer. A case is not made out if it appears that the husband enticed the defendant into illicit intercourse with him. *Churchill v. Lewis*, 17 Abb. N. C. 226.

It seems that no action will lie by the wife against a woman with whom her husband has had carnal intercourse merely because of such fact, so long as he in other respects discharges his marital obligations.

## Art. 4. Alienation of Affection; Elements of the Wrong.

Where the action is brought by one woman against another the gist of the action is loss of consortium, and not the mere loss of assistance, and the plaintiff cannot succeed unless she shows that the defendant was the active and inducing cause of the abandonment, and that such abandonment did not result solely from the wishes of the husband, and the fact that the husband was attracted and submitted to the intercourse is not sufficient. *Romaine v. Decker*, 11 App. Div. 20, 77 St. Rep. 79, 43 N. Y. Supp. 79. This case is criticised in *Buchanan v. Foster*, 23 App. Div. 544, 48 N. Y. Supp. 732.

Where an action is brought by a woman against another woman she must show that the defendant actually did or said something with the intent to engage the husband's affections, and to seduce him from fidelity to his wife. *Whitman v. Egbert*, 27 App. Div. 374, 50 N. Y. Supp. 3.

## ARTICLE IV.

## ALIENATION OF AFFECTION; ELEMENTS OF THE WRONG.

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## SUBDIVISION 1.

## Is a Distinct Wrong.

If one alienate the wife's affections he is liable, although there is no elopement or adultery. *Rhinehart v. Bills*, 82 Mo. 534.

It is not necessary to show loss of services; such loss need not be alleged or proven, but is merely a matter in aggravation. *Bennett v. Bennett*, 116 N. Y. 587.

## SUBDIVISION 2.

## Loss of Consortium is the Gravamen of Action.

Actions for alienation of affection and enticing away are generally stated to be founded upon loss of the *consortium*, the meaning of which term is stated in *Baker v. Baker*, 16 Abb. N. C. 295. In that case it was contended that while the husband may maintain an action for enticing away upon the ground that he has the right to his wife's services, that the wife has no similar action because she has no right to her husband's services. The court approves of the statements in Bigelow on Torts, 153, as follows:

## Art. 4. Alienation of Affection; Elements of the Wrong.

"To entice away or corrupt the mind and affections of one's consort is a civil wrong, for which the offender is liable to the injured husband or wife. The gist of the action is *not the loss of assistance*, but the loss of the *consortium* of the wife or husband, under which term are usually included the person's *affection, society, or aid*."

In an action for alienation of affection it is not necessary to show that the husband was actually deprived of the physical presence of the wife. The court, after citing cases on alienation of affection, says: "The case before us differs from the cases cited, not in principle, but only in the fact that there was no actual departure of the wife from the husband's house in the case before us. But how does this fact change the case or the principle to be determined by it? The injury in either case is the same, upon the authority above cited. I am not sure that the wrong and injury is not aggravated by the fact that the wife still remains in the house of the husband. Here was the same poisoning of her mind; the same alienation of affections from the husband; the same refusal to receive or acknowledge him as a husband and to live with him as such; the same refusal to give him comfort, fellowship, and society; the same refusal of her aid and assistance in his domestic affairs — all that constitutes the gist of the action — and all equally induced by the unlawful act and advice of the defendant. Her actual presence in his house and with him, under such circumstances, maintaining and exhibiting toward him such feeling, could afford him no relief from the injury inflicted, but would rather add the provocation of insult to the keenness of suffering." The court further says: "The same authorities hold that there may be desertion, though the parties continue to occupy the same house." *Herrmance v. James*, 47 Barb. 125; s. c., 32 How. Pr. 142, citing 1 Bishop on Marriage and Divorce, § 779; 2 Little (Ky.), 337; *Moss v. Moss*, 2 Ired. (N. C.) 35.

An action by the wife for alienation of her husband's affections lies, though the husband continue to live with the plaintiff. The basis of the action is loss of consortium, or the loss by the wife of the conjugal society of the husband. *Van Olinda v. Hall*, 88 Hun, 452, 66 St. Rep. 711, 34 N. Y. Supp. 777.

The action for enticing away and depriving a husband of his wife's comfort, aid, and society is founded upon the loss of consortium, or the right of the husband to the conjugal society of his

## Art. 4. Alienation of Affection; Elements of the Wrong.

wife. It is not necessary that there should be any pecuniary loss. *Bennett v. Bennett*, 116 N. Y. 587.

See *Serviss v. Serviss*, 172 N. Y. 438, reversing 64 App. Div. 612, for an action brought by the wife against her husband's parents for alienation of his affections. The evidence would have warranted the jury in finding that if he ever had any affection for her it had been alienated in some other way than by act of the defendants. Judgment for the plaintiff was reversed because of the refusal to charge that the plaintiff could not recover if at the time of the abandonment her husband had no affection for her, or that it had been previously alienated by other acts.

In *Hoard v. Peck*, 56 Barb. 202, it was held that an action for alienating affections and loss of society would lie against a druggist who had furnished plaintiff's wife secretly large quantities of laudanum, to be used by her as a beverage and which were so used by her, and without consent of the husband, whereby the wife became sick; her mind affected; and affections alienated, and she was rendered incapable of performing her duties as wife. Morgan, J., dissenting.

In *Modisett v. McPike*, 74 Mo. 636, it was held that an action would lie against one for inducing a woman to obtain a divorce from her husband in a case where she would not have obtained such divorce except for the unsolicited interference of the defendant.

In *Eldredge v. Eldredge*, 79 Hun, 511, 61 St. Rep. 540, 29 N. Y. Supp. 941, it was held that, where the action was brought by the wife for alienation of affections of her husband and loss of his companionship, the plaintiff must show that the defendant wrongfully persuaded and enticed the husband away from her, and deprived her of his society by means of tortious acts. It should be noted that this action was brought against the husband's relatives.

The attempt of the plaintiff to alienate the affections of the plaintiff's husband must be successful. A mere attempt to alienate the affections is not sufficient. *Van Olinda v. Hall*, 88 Hun, 452, 66 St. Rep. 711, 34 N. Y. Supp. 777.

In an action for alienation of affection intentional alienation must be shown. It is not enough that the defendant merely kept a bawdy house and that the husband went there and associated with her. *Warner v. Miller*, 17 Abb. N. C. 221.



## Art. 5. Abduction, and Enticing Away; Elements of the Wrong.

One who, by falsehood and fraud, induces a man to marry a woman is guilty of a wrong that may be remedied by an action, the amount of damages to be recovered depending upon the circumstances of the particular case.

One who, in the belief that a woman is virtuous, is induced to marry her by the false representations of a third party, by whom she is at the time pregnant, may maintain an action for damages against the wrongdoer upon the broad ground of the loss of *consortium*, to which the husband is entitled and of which, by the fraud complained of, he had been deprived. *Kujek v. Goldman*. 150 N. Y. 176.

## ARTICLE V.

## ABDUCTION, AND ENTICING AWAY; ELEMENTS OF THE WRONG.

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## SUBDIVISION 1.

## Is a Distinct Wrong.

"The action for seducing the wife away from the husband is by no means confined to the case of improper and adulterous relations; but it extends to all cases of wrongful interference in the family affairs of others whereby the wife is induced to leave the husband, or to so conduct herself that the comfort of the married life is destroyed." Cooley on Torts, 225.

See note on the distinctions between action for enticing away and harboring, and one for criminal conversation in *Buckel v. Suss*, 28 Abb. N. C. 25, followed by note on distinction between action for enticing away wife or husband and criminal conversation (p. 25), 18 N. Y. Supp. 719, affirmed on opinion below, 21 N. Y. Supp. 907. While one action may comprehend the two subjects, there are many cases which do not comprehend both. For example, there may be enticing away and harboring without criminal conversation, as where the father of a wife believes she is being ill-treated, and invites her to return home. While, on the contrary, the husband's right to recover against the seducer of his wife is not barred by his continuing to live with her after knowledge of her infidelity, the reason being that the

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 Art. 5. Abduction, and Enticing Away; Elements of the Wrong.
 

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husband may forgive the wife without forgiving the author of her defilement. Citing *Sikes v. Tipper*, 42 Alb. L. J. 177.

Where the only charge against the defendant is that he is harboring plaintiff's wife, it would seem that his intention in so harboring her is the material point of inquiry. If she has acted in good faith, even though mistaken as to the facts, the plaintiff cannot recover. See *Smith v. Lyke*, 13 Hun, 204. In this case the action for harboring is distinguished from the action for criminal conversation, where the intent and knowledge of the defendant does not seem to be material.

In *Warner v. Miller*, 17 Abb. N. C. 221 (224), the trial court in charging the jury made a distinction in cases where the action is brought by the husband. "The husband has a right to say where he shall live, and within certain limits he has that freedom to choose in many respects which the law does not accord to the wife. Hence, I say to you that for mere harboring—that is, from the fact that Warner went to this house of prostitution,—no action can be maintained by Mrs. Warner. There must be enticement, there must be inducement, personal inducement, before the action can be maintained."

#### SUBDIVISION 2.

##### As to Loss of Services.

It is not necessary to show loss of services, though it is a usual element in actions by the husband. But it is not essential to an action, which may be sustained upon the loss of consortium. Both the husband and the wife have an action founded upon that ground. *Baker v. Baker*, 16 Abb. N. C. 293.

Where the action is solely for enticing away, and not for criminal conversation, the action is based upon loss of consortium or conjugal society. The wife cannot maintain such action where she has voluntarily left her husband and lives apart from him under a separation agreement entered into under sanction of the court. *Buckel v. Suss*, 28 Abb. N. C. 21, 18 N. Y. Supp. 719, citing *Reeves' Dom. Rel.* (Ed. 1867) 175, affirmed on opinion below, 21 N. Y. Supp. 907.

#### SUBDIVISION 3.

##### Intent of Defendant is Vital Element.

In an action against a stranger for harboring the plaintiff's wife, it was held that the material point of inquiry was the intent

## Art. 5. Abduction, and Enticing Away; Elements of the Wrong.

with which the defendant acted, that this was a question for the jury upon the facts proven. That is to say, whether the defendant had allowed the plaintiff's wife to come to his house and remain there with a view to depriving plaintiff of her society, or whether it was a mere act of hospitality. *Schuneman v. Palmer*, 4 Barb. 225.

In any case where the wife is not justified in abandoning her husband, he who knowingly and intentionally assists her in violating her duty is guilty of a wrong for which action will lie. Facts which would justify the defendant in harboring the wife of another will not excuse active interference with the husband's affairs either by advising her to leave her husband or in carrying her away. *Barnes v. Allen*, 30 Barb. 663.

In *Hutcheson v. Peck*, 5 Johns. 195, it was held that where the husband brought action against his wife's father for enticing her away, much stronger evidence of malice and improper motives in defendant is required than where the action is against a stranger, the presumption being in favor of the defendant and that he was actuated by parental affection.

Speaking of an action brought against a parent for harboring his daughter against her husband's will, the court said: "No action of this kind should be countenanced in the absence of proof which leads to no other conclusion than that the defendant has acted maliciously." A motion for an injunction restraining the father from harboring his daughter was denied. *Campbell v. Carter*, 6 Abb. Pr. (N. S.) 151, 3 Daly, 165.

In *Pollock v. Pollock*, 9 Misc. Rep. 82, 59 St. Rep. 750, 29 N. Y. Supp. 37, it was held that proof that the father did not approve of his son's marriage; that he wished to extricate him therefrom, and that he employed his son, gave him money, and harbored him at home, and that he ejected the wife from his house, was not sufficient to justify a recovery against the father, as such acts might be attributed to parental solicitude of his child's welfare, and not to a desire to separate husband and wife. In this case the court says: "Increased intensity of proof is required in cases of this character, where a recovery is sought against a parent. The motives of a parent in harboring children and otherwise extending aid or assistance to a child, are presumed to be good until the contrary is shown."

In an action brought by a wife against her father-in-law for

## Art. 6. Defenses.

alienating the husband's affections and enticing him away, evidence that the defendant upon learning of his son's marriage became exasperated and said he would not allow them to live together if it cost ten thousand dollars, not coupled with any evidence tending to show that he attempted to carry out his threat or that he ever persuaded his son not to live with his wife, is insufficient to establish liability. *Rubenstein v. Rubenstein*, 60 App. Div. 238, 69 N. Y. Supp. 1067, 103 St. Rep. 1067.

## ARTICLE VI.

## DEFENSES.

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## SUBDIVISION 1.

## Prior Divorce.

In England and Canada it has been held that the prior separation of the plaintiff and his wife by articles of separation or a parol agreement is a bar to an action for criminal conversation. This rule is followed in Pennsylvania. But the contrary is the rule in most other States. See 8 Am. & Eng. Encyc. of Law (2d ed.), 263.

For a case where the defendant married the plaintiff's wife in reliance upon a void foreign divorce, and where it was held that he had the right to court and marry her, see *Hollister v. Valentine*, 69 App. Div. 582, 75 N. Y. Supp. 115, 109 St. Rep. 115.

## SUBDIVISION 2.

## Collusion, Condonation, Consent.

The law is clearly settled that in an action for criminal conversation if the husband consents to the wife's adultery, it is a bar to the action. If he is guilty of negligence, or loose or improper conduct, not amounting to consent, it goes in reduction of damages. *Bunnell v. Greathead*, 49 Barb. 106.

Where an action is brought by a husband for alienation of his wife's affections, the defendant may set up and prove the adultery

## Art. 6. Defenses.

of the plaintiff; that he had bragged and boasted about it to his wife, and that he had importuned her to have intercourse with other men. Such facts may amount to a complete defense, and in any event are competent in mitigation of damages. *Schorn v. Berry*, 63 Hun, 110, 43 St. Rep. 508, 17 N. Y. Supp. 572. The court said: "In an action for criminal conversation if the husband consents to his wife's adultery, it is a bar to an action, whether the consent be general, by giving a general license to his wife to conduct herself as she pleases with men generally, or by assenting to a particular act of adultery charged." Citing *Winter v. Henn*, 4 C. & P. 498; *Bunnell v. Greathead*, 49 Barb. 106; *Cibber v. Sloper*, cited in *Duberly v. Gunning*, 4 Term R. 655; *Sanborn v. Neilson*, 4 N. H. 501; *Cook v. Wood*, 30 Ga. 891.

## SUBDIVISION 3.

## Justification.

In *Bennett v. Smith*, 21 Barb. 442, it is stated that in an action for enticing away a wife "there is a clear distinction between the cases where the action is against a parent of the wife and where it is against a stranger. Parents are under obligations, by the law of nature, to protect their children from injury and relieve them when in distress; \* \* \* This is recognized by the common law, and is the foundation of the rule which allows parents to do some things in respect to and in behalf of their children which are not allowed to be done by others. \* \* \* This duty of protection, in reason and justice, extends to wrongs done or threatened by a husband as well as by other persons, and the acts of parents are entitled to be regarded in the same spirit in such a case as in others. Where the conduct of the husband is such as to endanger the personal safety of his wife, or is so immoral and indecent as to render him grossly unfit for her society, so much so that she would be justified in abandoning him, her parents ought to and I have no doubt have, the right, not only to receive her into, and allow her the comforts of their house, which even a stranger may do in such a case, but also to advise her to come and remain there. \* \* \* And the same doctrine, in my judgment, is applicable to a case where the advice is given by a parent in the honest belief, justified by information received by him, that such circumstances exist, although the information may subsequently prove to have been unfounded."

## Art. 6. Defenses.

See *Smith v. Lyke*, 13 Hun, 204, holding that in actions for harboring the wife the material point of inquiry is the intent with which the defendant acted.

Where the loss of consortium is the gravamen of the action, query whether the defendant can justify the interference with the plaintiff's marital rights by showing that the plaintiff's husband had entered into carnal relations with the defendant's daughter prior to such interference and without their knowledge. See *Kuhn v. Emmann*, 43 App. Div. 108, 59 N. Y. Supp. 341.

It seems that the poverty of the husband is rather an aggravation in cases where he is deprived of her assistance. "It is the duty of the wife to live with him and assist him in improving his affairs." *Bennett v. Smith*, 21 Barb. 446.

It has been held that in an action for enticing away, the defendant, in order to justify his interference in removing the wife from plaintiff's house, is bound to show that she was abused, and mere statements that she was abused, without proof thereof, are no defense. Neither are the statements of the wife that she was abused sufficient. *Barnes v. Allen*, 30 Barb. 668.

The defendant may show that the plaintiff had carnal connection with other men at any time after marriage and before trial, in mitigation of damages. *Schorn v. Berry*, 63 Hun, 110, 43 St. Rep. 508, 17 N. Y. Supp. 572, citing *Smith v. Martin*, 15 Wend. 270; *Shattuck v. Hammond*, 46 Vt. 466; *Rhea v. Tucker*, 51 Ill. 110.

## SUBDIVISION 4.

## Plaintiff's Husband was Wrongdoer.

Where an action is brought by the wife against another woman for alienation of her husband's affections, she must show affirmatively that the defendant did or said something with a willful and wrongful intent to engage the husband's affections and seduce him from fidelity to his wife. The law imputes no fault to the defendant because of her attractiveness, or because she may have been pleased with the attentions of the plaintiff's husband. *Whitman v. Egbert*, 27 App. Div. 374, 50 N. Y. Supp. 3, citing *Van Olinda v. Hall*, 88 Hun, 452; *Manwarren v. Mason*, 39 Hun, 40; *Eldredge v. Eldredge*, 79 Hun, 511; *Bennett v. Bennett*, 116 N. Y. 584; *Buchanan v. Foster*, 23 App. Div. 542. See *Romaine v. Decker*, 11 App. Div. 20, 43 N. Y. Supp. 79.

## Art. 7. Pleading.

## ARTICLE VII.

## PLEADING.

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## SUBDIVISION 1.

## Complaint.

Where the complaint, after alleging that the defendant maliciously alienated the affections of the plaintiff's wife, and debauched and carnally knew her, alleged that in consequence, etc., of such criminal relations her affections were alienated, and she was wrongfully induced and enticed by the defendant to leave plaintiff, and that by reason of the premises the affection which she previously had for plaintiff was alienated and destroyed, and plaintiff deprived of her comfort and society, etc., to his distress of mind and damage, etc. *Held*, that the complaint stated but a single cause of action for criminal conversation, and that the allegation of alienation of affection and enticement were by way of damage. *Currie v. Gardenier*, 59 App. Div. 319, 69 N. Y. Supp. 245, 103 St. Rep. 245.

For a complaint alleging alienation of affection, which was sustained upon demurrer, see *Heermance v. James*, 47 Barb. 120, 32 How. Pr. 142.

For a complaint which was held to state a cause of action both for criminal conversation and alienation of affection, see *Hollister v. Valentine*, 69 App. Div. 582, 75 N. Y. Supp. 115, 109 St. Rep. 115.

## SUBDIVISION 2.

## Answer.

The answer may allege the adultery of the plaintiff; that he bragged and boasted about it to his wife, and that he importuned her to have intercourse with other men. Such matters should not be stricken out as irrelevant, redundant, or scandalous. *Schorn v. Berry*, 63 Hun, 110, 43 St. Rep. 508, 17 N. Y. Supp. 572.

In an action for alienating the affections of her husband, allegations of his previous divorce and separation should be stated to

## Art. 7. Pleading.

be a partial defense, and if the pleader omits to so state them, an order will be granted requiring defendant to make these allegations more definite and certain, so that it will clearly appear whether they are intended as a complete or partial defense. *Simmons v. Simmons*, 21 Abb. N. C. 469, 4 N. Y. Supp. 221.

## SUBDIVISION 3.

## Bill of Particulars.

In an action for criminal conversation the court of original jurisdiction has power to require the plaintiff to furnish a bill of particulars, and the denial of such application, based solely upon the ground of want of power, is reviewable by the Court of Appeals. *Tilton v. Beecher*, 59 N. Y. 176.

As to when a bill of particulars will be denied, see *Van Olinda v. Hall*, 82 Hun, 357, 64 St. Rep. 94, 31 N. Y. Supp. 495. It was held that the failure of the defendant to deny the charges of the complaint raised an inference that the facts alleged in the complaint were within her knowledge.

See *Schaffer v. Holm*, 28 Hun, 264, 3 Civ. Proc. 81, for a case in which an order for bill of particulars was granted. The charges of adultery were upon information and belief, and, on motion, the plaintiff stated that the matters were not within his personal knowledge and that he believed it would not be safe for him to make a verified bill. Defendant's motion for bill of particulars was granted.

A bill of particulars was refused in an action brought by the wife where the only charge was that her husband's uncle had alienated her husband's affections and had broken up her home by the continued depreciation of the plaintiff. *Kirby v. Kirby*, 34 App. Div. 25, 54 N. Y. Supp. 1074.

In an action for criminal conversation where the complaint alleged that the affections of the plaintiff's wife had been alienated by means of "gifts, presents, promises, threats, and seductive arts and wiles," it was held that a case was made out for a bill of particulars. *Woods v. Gledhill*, 35 St. Rep. 597, 20 Civ. Proc. 155, 12 N. Y. Supp. 764.

Where, on order, the plaintiff filed a bill of particulars, stating certain adulterous intercourse and his inability to state the date of other adulterous intercourse, which order for a bill of particulars was not appealed from, and where a subsequent order was



## Art. 7. Pleading.

made precluding the plaintiff from giving evidence of acts of adultery other than those stated in the bill of particulars,—*Held*, on appeal from the latter order, that the court could not determine whether the order directing the bill of particulars was properly granted. That as the plaintiff did not comply with such order the court was justified in making the order from which the appeal was taken. *Weston v. Weston*, 68 App. Div. 483, 74 N. Y. Supp. 38, 108 St. Rep. 38.

## FORMS.

**Complaint Alleging Alienating of Affection and Criminal  
Conversation.**

SUPREME COURT — WESTCHESTER COUNTY.

CHARLES A. HOLLISTER

*agst.*

EDWARD VALENTINE.

Complaint, 69 App. Div. 582.

The plaintiff complaining of the defendant alleges:

I. That on or about November 25, 1896, at the city of Newark, N. J., the plaintiff intermarried with Naomi Voice, since named Naomi Hollister, and subsequent thereto the plaintiff and his wife lived together as man and wife, in the city of Mount Vernon, N. Y.; that at the time of said marriage the plaintiff and the said Naomi Voice were, and at all the times subsequent thereto have been and still are residents of the said city of Mount Vernon, N. Y.

II. That the defendant, contriving and willfully intending to injure the plaintiff and deprive him of the comfort, society, aid, and assistance of the said wife of the plaintiff and to alienate and destroy her affection for him, heretofore on or about the 1st day of August, 1900, and on divers other days and times after that day, and before the commencement of this action, at a hotel in the village of Peekskill, N. Y., and at the home of the defendant in Yonkers, N. Y., and at the home of one Naomi Duncombe, in the city of Mount Vernon, N. Y., and elsewhere, wrongfully and wickedly, and without the privity or connivance of the plaintiff, debauched and carnally knew the said Naomi Hollister, then and ever since the wife of the plaintiff, by means whereof the affection of the said Naomi Hollister, for the plaintiff, was wholly alienated and destroyed; and by reason of the premises the plaintiff has wholly lost the comfort, society, and

## Art. 7. Pleading.

assistance of his said wife, which, during all the time aforesaid, he otherwise might and ought to have had and enjoyed.

III. That, by reason thereof, plaintiff has suffered great distress in body and mind, to the damage of the plaintiff \$10,000, for which sum, together with the costs and disbursements of this action, the plaintiff demands judgment.

(Verified.)

FRANK R. BENNETT,  
*Plaintiff's Attorney.*

**Enticing Away and Alienation of Affection; by Wife.**

SUPREME COURT — CHENANGO COUNTY.

ELVIRA J. BENNETT

*agst.*

OLIVER BENNETT.

Complaint, 116 N. Y. 584.

The plaintiff complaining of the defendant alleges:

I. That William H. Bennett is and at the times hereinafter mentioned was the husband of the plaintiff, and that the said William H. Bennett and plaintiff were married on or about the 4th day of February, 1883.

II. That immediately thereafter and on the same day that plaintiff was married, her said husband took her to reside on the farm of and in the family of the defendant, who then resided and still resides in the town of Greene in said county of Chenango.

III. That from the time the plaintiff commenced to reside in the family of the defendant, and while the plaintiff was living and cohabiting with and being supported by her said husband, and while they were living together happily as man and wife, the defendant well knowing her to be the wife of said William H. Bennett, and wrongfully contriving and intending to injure the plaintiff, and to deprive her of his comfort, society, and aid, made threats to the said William H. Bennett, that if he continued to live with the plaintiff as his wife, he would not give him any of his property, and by such threats and promises of valuable presents being made to him, and by representations made to him by the defendant that the plaintiff was unfit to be his wife and life companion, and of her humble birth and parentage, and that she was much his inferior, and other threats, representations, and promises, made by the defendant to said William H. Bennett, he alienated and destroyed the love and affection of the said William H. Bennett, her husband, for her, and also the defendant threatened the plaintiff with violence and great bodily harm if she remained with her said husband, and by his threat and ill-treat-

## Art. 7. Pleading.

ment drove plaintiff away from her home and husband, and the defendant encouraged and directed her said husband to take and carry away from his house the clothing and goods of the plaintiff, and induced the said William H. Bennett to remain with defendant and apart from the plaintiff, and since on or about the 1st day of June, 1883, the plaintiff has been compelled to live separate and apart from her said husband, and the said William H. Bennett, her husband, by the threats and promises of the defendant, as aforesaid, has continued to reside with the said defendant against the consent of the plaintiff, and in opposition to her utmost peaceable efforts to obtain him from the defendant's custody, control, and influence to enable her to live with him as his wife.

IV. That by reason of the premises the plaintiff has been and is still wrongfully deprived by the defendant of the comfort, society, and aid of her said husband, and has been put to great trouble and expense in providing for herself a home and maintenance, and has suffered great distress of body and mind, to her damage \$5,000.

WHEREFORE plaintiff demands judgment against the defendant for the sum of \$5,000, and costs of this action.

(Verified.)

CANIFF & PETRIE,  
*Plaintiff's Attorneys.*

## Answer.

## SUPREME COURT.

ELVIRA J. BENNETT

*agst.*

OLIVER BENNETT.

Answer, 116 N. Y. 584.

The above-named defendant, answering the complaint of the plaintiff in this action, says:

I. That he admits that the plaintiff married William H. Bennett, the son of the defendant, on or about the 4th day of February, 1883, and that said William and plaintiff thereafter came and lived and made it their home with this defendant for about four months thereafter, with intervals of absence on the part of the plaintiff; and that, except as hereinbefore expressly admitted, he denies each and every allegation of said complaint.

II. And this defendant further answering, and for a second and further defense, further says that he has wished and still wishes said William and the plaintiff to live together as husband and wife, and in harmony and with mutual affection, and that he has used, and is willing to still use, every honorable means to induce said plaintiff

## Art. 7. Pleading.

and said William to live together in peace and harmony, as husband and wife, and that their not doing so is owing wholly to the voluntary act of said plaintiff.

WHEREFORE defendant asks judgment in his favor.

CLARK & BROWN,  
*Defendant's Attorneys.*

**Answer Alleging Vicious Character of Plaintiff in Mitigation of Damage.**

SUPREME COURT — COUNTY OF CHENANGO.

JULIUS A. SCHORN

*agst.*

CHARLES A. BERRY.

} Answer, 63 Hun, 110.

The defendant in this action answers the complaint of the plaintiff and for his defenses thereto alleges the following facts:

*First Defense.*

For a first defense this defendant denies the complaint of the plaintiff and each and every allegation and statement therein contained, and each and every part of the same, except he alleges that as to whether or not at the times mentioned in the complaint Clara Schorn was the wife of the plaintiff, this defendant has no particular knowledge, but admits the same, and admits that she resided at Norwich, Chenango county, N. Y., and also admits that this defendant resides at Norwich, Chenango county, N. Y.

*Second Defense.*

And for a second and further defense, and in mitigation and reduction of damages, this defendant alleges, on information and belief, that at the time and times mentioned in the complaint, and for a long time prior thereto, the said Clara Schorn had no affection for the plaintiff, said Julius A. Schorn, and alleges that the plaintiff, Julius A. Schorn, by his own misconduct and cruel and inhuman treatment of the said Clara Schorn, had absolutely and wholly alienated and destroyed the affection of the said Clara Schorn for the plaintiff.

That on divers occasions, the exact dates this defendant being unable to give, the plaintiff called the said Clara Schorn vile and abusive names and threatened to kill the said Clara Schorn.

That on divers and different occasions during the years 1886, 1887,

## Art. 8. Evidence.

1888, 1889, and 1890, the plaintiff had carnal and criminal connection and intercourse with his servant girls and with other females and bragged and boasted of the same to the said Clara Schorn, his said wife, and importuned his said wife to have intercourse with other men.

That the plaintiff has no affection or love for his said wife, and has not had for years, and many years ago absolutely alienated and destroyed all the affection said Clara Schorn ever had for him.

All of which the defendant will prove upon the trial of this action as a defense and also in mitigation of damages.

WHEREFORE this defendant demands judgment that the complaint of the plaintiff be dismissed, with costs.

GEORGE W. RAY,  
*Defendant's Attorney.*

## ARTICLE VIII.

## EVIDENCE.

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## SUBDIVISION 1.

## Of Marriage.

In an action for criminal conversation, the plaintiff's divorced wife is a competent witness for him to prove the marriage as well as the offense charged. She may testify as to whether the marriage ceremony between her and the plaintiff in Prussia was according to the usual manner of marriage in that country. *Wottrich v. Freeman*, 71 N. Y. 601.

## SUBDIVISION 2.

## Of Adultery and Alienation of Affection.

The Code of Civil Procedure, § 831, as amended by Laws of 1879, 1880, 1887, makes the following provision as to testimony by plaintiff's wife in an action for criminal conversation: "In

## Art. 8. Evidence.

an action for criminal conversation, the plaintiff's wife is not a competent witness for the plaintiff, but she is a competent witness for the defendant as to any matter in controversy; except that she cannot, without the plaintiff's consent, disclose any confidential communication had or made between herself and the plaintiff."

Section 831 of the Code of Civil Procedure does not apply to the evidence of the husband in an action for the debauching of his wife. He is a competent witness to prove any facts tending to show the charge of misconduct, although it may implicate the wife in the transaction. *Woods v. Gledhill*, 56 Hun, 220, 9 N. Y. Supp. 266, citing *Smith v. O'Brien*, 6 N. Y. Supp. 174.

The plaintiff's wife, after divorce, is a competent witness for the plaintiff to prove the adultery of defendant. *Ratcliffe v. Wales*, 1 Hill, 62.

In an action for criminal conversation, the divorced wife of the plaintiff is competent witness to prove the offense charged. *Wott- rich v. Freeman*, 71 N. Y. 601.

Where the plaintiff testified that he had seen acts of familiarity between the defendant and his wife and had seen her in defendant's bed, and where the adultery was denied both by the wife and the defendant, and by the testimony of numerous witnesses, uninterested, it was held that a verdict for the plaintiff should be set aside as against the weight of evidence. *Boues v. Steffen*, 43 St. Rep. 29, 16 N. Y. Supp. 819.

In an action for criminal conversation, where the adultery is not shown by direct proof, the plaintiff must show, first, disposition to illicit intercourse on part of the wife; second, a disposition to illicit intercourse with the wife on part of defendant; and, third, an opportunity to gratify such mutual disposition. *Ramsey v. Ryerson*, 24 Abb. N. C. 115.

See *Wilson v. Coulter*, 29 App. Div. 85, 51 N. Y. Supp. 804, for a case where the conduct of defendants, plaintiff's sisters-in-law, was held to raise a question for the jury as to whether they had alienated the affection of the husband.

## SUBDIVISION 3.

## Of Character of Parties, and Mutual Relations.

Evidence that the plaintiff (husband) is an habitual drunkard and frequenter of brothels and debased, etc., is admissible as

## Art. 8. Evidence.

bearing upon question of damages. *Bennett v. Smith*, 21 Barb. 446.

In an action for enticing away, evidence of a general report that the plaintiff ill-treated his wife is inadmissible by the way of justification. *Barnes v. Allen*, 30 Barb. 668.

The fact that the plaintiff had criminal connection with other women at any time after marriage and before trial may be shown to reduce damages. *Schorn v. Berry*, 63 Hun, 110, 17 N. Y. Supp. 572.

Though the character of the plaintiff, and the husband or wife with whom the offense was committed, may be shown on the question of damages, the defendant's character is not in issue and cannot be shown. *Cross v. Rutledge*, 81 Ill. 266.

The character of the plaintiff before the wrong may be shown on the question of damages. *Sanborn v. Neilson*, 4 N. H. 501. And if the wife's character has been attacked the plaintiff may give evidence of her good character, but not otherwise. *Pratt v. Andrews*, 4 N. Y. 493.

If alleged in the answer as a partial defense in mitigation of damage, the defendant may prove adultery by the plaintiff; the relations he sustained toward his wife, whether affectionate or otherwise, cruel treatment, bad habits, or any fact tending to show the character of the plaintiff before the commencement of the action. *Billings v. Albright*, 66 App. Div. 239, 73 N. Y. Supp. 22, 107 St. Rep. 22.

Proof generally of the relations existing between the plaintiff and her husband is admissible upon question of damages. But mere details of quarrels occurring between plaintiff and her husband, and declarations which in no manner demonstrate the relations existing between them are not competent. Nor is evidence of husband's will competent against the defendant, where the will was executed at a time when defendant was absent from the country. *Romaine v. Decker*, 11 App. Div. 20, 77 St. Rep. 79, 43 N. Y. Supp. 79. See criticism of this case in 23 App. Div. 544, 48 N. Y. Supp. 732.

In an action for damages for alienation of affection, where the plaintiff and his wife were living happily together, it was held that evidence tending to show that they did not live happily together, and that the wife had no affection for the plaintiff, and that he lost nothing by the deprivation of her society, is admissible

## Art. 8. Evidence.

under a general denial. *Edwards v. Nichols*, 21 Week. Dig. 238.

The debauched character of the plaintiff may be shown on question of damages. If the plaintiff be guilty of negligence or loose and immoral conduct, it goes in reduction of damages. *Bennett v. Smith*, 21 Barb. 446, followed 69 App. Div. 245.

As to evidence showing relation between husband and wife, see *Lewis v. Hoffman*, 54 App. Div. 620, 66 N. Y. Supp. 428.

## SUBDIVISION 4.

*Res Gestæ.*

Declarations of the wife made within a few days after her marriage, showing her wishes in respect to living with the husband as his wife, and in connection with other circumstances, tending to show she was not under restraint, are admissible as part of the *res gestæ*. *Bennett v. Smith*, 21 Barb. 446.

A wife suing a third person for enticing away her husband may testify as to a conversation between herself and her husband at the time they separated, which tends to show the reasons assigned by the husband for the separation. This is part of the *res gestæ*. *Baker v. Baker*, 16 Abb. N. C. 293.

The oral declarations made to the plaintiff by his wife, or in his presence and in the absence of the defendant, before the commencement of the action, which indicate the state of his wife's feelings toward him, are competent only in the absence of proof of collusion, and for the sole purpose of proving the state of such feeling and its bearing upon the question of damages. The plaintiff may testify as to statements of any other person who may have heard them. But declarations made by the wife to third parties in the absence of both plaintiff and defendant, and which are not in explanation of or which do not characterize an act, part of the *res gestæ*, are not competent for any purpose. *Billings v. Albright*, 66 App. Div. 239, 73 N. Y. Supp. 22, 107 St. Rep. 22.

A letter written by the plaintiff to her husband more than two years after the action was begun is not admissible against the defendant as tending to show the existence of affectionate relations between the plaintiff and her husband, or as having a bearing upon the question of damages. The court said: "A letter of that character, if written while the parties were living together, might have been admissible to show that the plaintiff and her husband prior to any alleged act of interference on the part of the defend-



## Art. 8. Evidence.

ant were living in harmonious relations; but declarations made so long after the action was begun were not competent against the defendant." *Rubenstein v. Rubenstein*, 60 App. Div. 238, 69 N. Y. Supp. 1067, 103 St. Rep. 1067.

It seems that where the action was brought by the wife, proof of the acts of the husband and the defendant six months prior to the marriage is inadmissible. *Eldredge v. Eldredge*, 79 Hun, 511, 61 St. Rep. 540.

Declarations of the plaintiff's husband, and conversations between him and the plaintiff, both before and after commencement of the action, are not admissible. *Manwarren v. Mason*, 79 Hun, 592, 61 St. Rep. 533, 29 N. Y. Supp. 915.

In *Whitman v. Egbert*, 27 App. Div. 374, 50 N. Y. Supp. 3, a letter written to the plaintiff by the husband a few days before he entirely abandoned her was held inadmissible, because it did not appear to be a spontaneous oral declaration accompanying an act, and, therefore, a part of it, but appeared to be a deliberate *ex parte* narrative of facts and opinions.

## SUBDIVISION 5.

## Of Damage.

It is not necessary that there should be proof of any pecuniary loss in order to sustain the action. Neither is loss of services essential, but is merely a matter of aggravation, and need not be alleged or proven. *Bennett v. Bennett*, 116 N. Y. 587, citing *Hermance v. Janes*, 32 How. 142; *Rhinehart v. Bill*, 82 Mo. 534; *Bigouette v. Paulet*, 134 Mass. 125.

In *Churchill v. Lewis*, 17 Abb. N. C. 226, it was held that the jury might consider, in mitigation of damages, the fact that the plaintiff had cohabited with her husband after having believed him to have been guilty of illicit relations with the defendant. The relations between the plaintiff and her husband, and the fact as to whether they were happy or otherwise before the husband's acquaintance with defendant, and the state of his feelings and extent of his affection toward the plaintiff, may be shown and considered by the jury in estimating damage. *Churchill v. Lewis*, 17 Abb. N. C. 226.

In an action for criminal conversation matters of mitigation growing out of the relations existing between the parties at the time of the offense may be given in evidence under a general denial. *Harter v. Crill*, 33 Barb. 283.

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The motives which induced the defendant to do acts which constitute the cause of action may be considered on the question of damages. *Wilson v. Coulter*, 29 App. Div. 85, 51 N. Y. Supp. 804, citing *Barnes v. Allen*, 1 Abb. Ct. App. Dec. 111; 1 Keyes, 390; 1 Sedg. Dam. (8th ed.) 363.

## SUBDIVISION 6.

## Of Financial and Social Status of Defendant.

In *Matthews v. Mazet*, 164 Pa. St. 580, evidence as to the financial situation of the defendant was held to be admissible on the question of damages. To the same effect see *Browning v. Jones*, 52 Ill. App. 597.

Of the action for criminal conversation Blackstone says: " \* \* \* the law gives a satisfaction to the husband for it by action of trespass *vi et armis* against the adulterer, wherein the damages are usually very large and exemplary. But these are properly increased and diminished by circumstances; as the rank and fortune of the plaintiff and defendant." 3 Bl. Comm. 139.

Speaking of this *dictum*, Peters, J., in *Norton v. Warner*, 9 Conn. 172-174, states: "It is worthy of remark that these learned compilers do not quote a single authority in support of this doctrine. It may, therefore, be doubted, even in England, and *a fortiori* in this country, where it is considered a self-evident truth that all men are created equal."

In *Peter v. Lake*, 66 Ill. 206, it was held that evidence of defendant's wealth is inadmissible.

Where it was shown that the defendant, being a man of means, publicly threatened, in the presence of other persons, to disinherit his daughter unless she left her husband (the plaintiff) and come back to him, and where there was evidence that the wife had heard this threat and was influenced by it and left her husband, it was held that a motion to dismiss upon the ground that there was nothing to show that the defendant connived at the request of the wife to leave, was properly denied. *Remsen v. Hay*, 14 Week. Dig. 443.

## SUBDIVISION 7.

## Weight of Evidence; Miscellaneous.

Proof of adulterous intercourse of plaintiff's husband with the defendant, accompanied by proof that the husband while maintaining such relations with defendant abandoned his wife and

## Art. 8. Evidence.

remained away from her, is sufficient to require submission to the jury of the question as to whether the favors accorded to the husband by defendant were not the inducing cause of his desertion. *Romaine v. Decker*, 11 App. Div. 20, 77 St. Rep. 79, 43 N. Y. Supp. 79. This case, however, is distinguished and the rule stated to be *dictum* in *Buchanan v. Foster*, 23 App. Div. 544, 48 N. Y. Supp. 732.

Where a wife brought action against her husband's father for alienating his affections and enticing him away, it was held that proof that plaintiff's father-in-law, upon learning of his son's marriage, declared that he would not allow the son and wife to live together if it cost him ten thousand dollars, etc., but not coupled with any evidence tending to show that he had ever attempted to carry out this threat, is not sufficient to establish liability on part of defendant. *Rubenstein v. Rubenstein*, 60 App. Div. 238, 103 St. Rep. 1067, 69 N. Y. Supp. 1067.

Where the action is founded upon adultery, the failure of the jury to believe the defendant's denials of the adultery does not make it less incumbent upon the plaintiff to show affirmatively by competent and sufficient proof the fact of the adultery. "If the proof were insufficient to establish the charge the jury would not be at liberty to supply any defects in such proof by inferences from the outside, nor were they warranted in assuming that because they decided the defendant's narrative to be false that they were entitled to jump to the conclusion that the converse of that narrative must be true, without any further testimony." *Ramsey v. Ryerson*, 24 Abb. N. C. 114.

Declarations of the plaintiff's husband are not evidence against the defendant, and the rules of evidence governing the admission of declarations of co-conspirators have no application to these cases. *Romaine v. Decker*, 11 App. Div. 20, 77 St. Rep. 79, 43 N. Y. Supp. 79, distinguished in *Buchanan v. Foster*, 23 App. Div. 544, 48 N. Y. Supp. 732.

In an action for alienation of affection brought against the plaintiff's sisters-in-law, it is competent to show that the plaintiff's husband conveyed his property to the defendants, as such evidence bears upon their intention to deprive the plaintiff of means of support out of the property of the husband, and as tending to show that the defendants were interested in separating the husband from the wife, it not being pretended that the defendant

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paid anything for the conveyance. *Wilson v. Coulter*, 29 App. Div. 85, 51 N. Y. Supp. 804.

Evidence offered by the defendant to show that the plaintiff's husband was engaged to another woman, it not being asserted that the plaintiff knew of this engagement, is not admissible. *Wilson v. Coulter*, 29 App. Div. 85, 51 N. Y. Supp. 804.

In an action for criminal conversation, evidence of complaints made by the plaintiff to other parties in the absence of defendant are not admissible. *Boues v. Steffen*, 43 St. Rep. 29, 16 N. Y. Supp. 819.

## ARTICLE IX.

## PROCEDURE AND TRIAL.

An action for criminal conversation is an injury to the husband's person which will warrant an arrest of the defendant. *Straus v. Schwartwaelden*, 17 Super. Ct. (4 Bosw.) 627.

Attachment may be granted under section 635, subdivision 3, of the Code of Civil Procedure, in an action brought by the wife for alienating affections of her husband. *Rouge v. Rouge*, 15 Misc. Rep. 36, 36 N. Y. Supp. 436, affirming 14 Misc. Rep. 421. It was also held that the court may fix the amount of the attachment at such sum as in its judgment will probably be recovered in the action.

The defendant may be arrested under the provisions of the Code for enticing away. *Breiman v. Paasch*, 7 Abb. N. C. 249.

By virtue of section 5 of the Code of Civil Procedure, the court may, in its discretion, exclude all persons not directly interested in an action, excepting jurors, witnesses, and officers of the court, from the trial of an action of criminal conversation.

In *Servis v. Servis*, 172 N. Y. 438, reversing 64 App. Div. 612, the action was brought by the wife against her husband's parents for alienation of his affection. The evidence was conflicting, and would have warranted the jury in finding that, if the husband ever had any affection for his wife, it had been alienated in some other way than by the act of defendants. *Held*, to be reversible error for the court to refuse to charge that, if, at the time of the abandonment, the plaintiff's husband never had any affection for her, or that it had been previously alienated, she could not recover.

It is proper for the court to refuse to charge that the evidence is insufficient to justify a finding that the defendant and plain-

## Art. 9. Procedure and Trial.

tiff's wife committed adultery on any one of seven specified occasions, and it is proper for the court to charge in effect that, as to any one of the occasions as such appeared by itself, such instruction might be proper, but that in determining the issues they were to consider all the evidence and take into account all of the occasions, and if they found that the defendant had seduced plaintiff's wife and alienated her affections he was liable. *Burdick v. Freeman*, 120 N. Y. 420.

In an action brought against the father of a married woman for enticing her away, it is error to charge that the defendant is liable if he advises the wife to stay away from her husband, because a parent has a right so to do if the plaintiff is guilty of violent or immoral conduct. So, too, even if the parent acts on an honest belief that such is the case. *Bennett v. Smith*, 21 Barb. 439.

Where an action was brought by the husband against the wife's father for enticing away the wife, it was held proper to charge that, even if the husband's treatment of the wife was not corroborated in fact, yet if complaint were made to the defendant by the wife and others, which induced him to believe she was cruelly treated by the husband, and he acted in good faith in taking her to his house, the plaintiff could not recover. *Smith v. Lyke*, 13 Hun, 204. This is upon the theory that in actions for *harboring* the wife the material point of inquiry is the intention with which defendant acted.

If, in an action for criminal conversation, the plaintiff recovers less than \$50 damages, the amount of his costs cannot exceed his damages. Code, § 3228, subd. 3.

In *Smith v. Masten*, 15 Wend. 270, a new trial was granted on the grounds of newly-discovered evidence, and on payment of costs where, on the trial, the plaintiff discovered that the defendant had lived in a state of adultery with another woman after his wife had left him and previous to the trial.

A judgment in an action for criminal conversation is not released by the defendant's discharge in bankruptcy. The action implies malice in law, a wrongful act done intentionally without just cause or excuse. A judgment recovered therein is for a willful and malicious injury to the person or property of another. *Colwell v. Tinker*, 169 N. Y. 531, affirming 65 App. Div. 20, 106 St. Rep. 505.

**ARTICLE X.****DAMAGES.**

Punitive damages may be recovered in an action for alienation of affection as well as compensation for loss of support and maintenance. *Warner v. Miller*, 17 Abb. N. C. 221.

In *Smith v. Masten*, 15 Wend. 270, it was held that the courts have power to grant a new trial for excessive damages in cases of criminal conversation, though the court remarks that the power has never been exercised. Accordingly the court refused to set aside a verdict of \$3,000 damages, although it appeared that the plaintiff had reason to know of the improper conduct of his wife, suspected her, and yet took no measures to prevent intercourse between her and the defendant.

In an action for alienation of affection, if it appears that the plaintiff did not desire the society of her husband, a verdict of \$2,000 is excessive. *Van Olinda v. Hall*, 88 Hun, 452, 66 St. Rep. 711, 34 N. Y. Supp. 777.

In *Wilson v. Coulter*, 29 App. Div. 85, 51 N. Y. Supp. 804, a verdict of \$1,750 was held not to be excessive where the action was brought by the wife against her sisters-in-law for alienation of affection.

In *Bunnell v. Greathead*, 49 Barb. 106, a verdict of \$10,000 was set aside in an action where the plaintiff had witnessed the criminal conversation, but did not attempt to interfere. The court said: "If the evidence of the plaintiff did not bar the action, it certainly entitled him only to actual pecuniary damages which he sustained."

## CHAPTER XI.

### BREACH OF PROMISE TO MARRY.

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#### ARTICLE I.

##### DEFINITIONS AND DISTINCTIONS.

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##### SUBDIVISION 1.

###### Nature of the Action.

Text-writers upon torts have variously included and excluded the action for breach of contract to marry from consideration. Thus, Webb's Pollock on Torts (Am. ed.), at p. 222, says: "The action for breach of promise of marriage, being an action of contract, is not within the scope of this work; but it has curious points of affinity with actions of tort in its treatment and incidents; one of which is that a very large discretion is given to the jury as to damages." The text-writer might have added the additional affinity: "the fact that the action dies with the person." See cases under "Civil Action — Survival of Action."

At p. 686 Pollock cites the statement of LeBlanc, J., in *Chamberlain v. Williamson*, 2 M. & S. 408, that in these actions damages are "almost always considered by the jury somewhat *in poenam*."

Speaking of the anomalous character of the action for breach of promise to marry, the court, in *Thorn v. Knapp*, 42 N. Y. 474, said: "The action for the breach of contract of marriage, though

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in form of an action of assumpsit, is, in fact, and always has been since it was sustained at common law, in respect to this question of damages, really in the nature of an action for a tort."

"Although the action is founded upon contract, so far as the form is concerned, yet it is substantially an action for tort; it is purely a personal wrong — as much so as an action for assault and battery or slander. \* \* \* In fine in our practice, except in the mere form of pleading, it follows the analogy of an action of tort." Pratt, J., in *Cook v. Newman*, 8 How. Pr. 523.

The civil action is in form an action for breach of contract, the elements of which action are treated in a following article. Nevertheless there have been a few actions entertained by the courts in which the recovery, though involving a contract of marriage, has been based on fraud.

In *Reilly v. Sabater*, 26 Civ. Proc. 34, 43 N. Y. Supp. 383, we have an example of an action brought, not for damages for breach of contract to marry, but for damages for the defendant's fraud in having induced the plaintiff to enter into such a contract by means of false representations, when, in fact, the defendant was incapable of fulfilling the contract by reason of the fact that he was a married man. It was not decided whether such a cause of action lay, but the plaintiff was permitted to withdraw a juror and apply for an amendment of the complaint, the defense on the motion being that the statute of limitations of six years had barred the action.

An action may be brought by plaintiff against defendant for the latter procuring a marriage between himself and the plaintiff by false representations, when by law he was not competent to enter into a marriage contract. The action is founded upon the fraud of the defendant rather than upon breach of the contract, and where by statute the attempted marriage is void the plaintiff may commence the action without first procuring a formal annulment. *Blossom v. Barrett*, 37 N. Y. 434.

Somewhat analogous to breach of promise to marry is the action brought against a third person who has caused the breach of the contract. Cooley on Torts (2d ed.), at p. 277, states: "The prevention of marriage by the interference of a third person cannot, in general, in itself, be a legal wrong. Thus if one by solicitations, or by the arts of ridicule or otherwise, shall induce one to break off



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an existing contract of marriage, no action will lie for it, however contemptible and blamable may be the conduct. But a loss of marriage may be such a special injury as will support an action of slander or libel, where the party was induced to break off the engagement by false and damaging charges not actionable *per se*. Here the action, it is perceived, is for defamation, and the loss of the marriage is the damage flowing from the injury."

**SUBDIVISION 2.****Distinguished from Seduction.**

Breach of contract to marry and seduction are separate wrongs; but as is evident they may be associated in fact. Thus, breach of promise may be aggravated by an accompanying seduction, which may be in aggravation of damage (see "Damages — Punitive"); and subject the offender to an action by the people. (See "Remedies — Criminal Action," under this article.) A point of difference is that seduction cannot be brought by the woman seduced; while the action for breach of promise to marry lies on behalf of the woman.

Another distinguishing point between actions for breach of promise to marry and seduction is that the former cannot be brought against an infant; that is to say, in this respect it is an action on contract and not upon tort, while an action for seduction lies against an infant defendant. See cases collated under "Elements of the Wrong — Capacity to Contract — Infancy."

In an action for breach of promise to marry the plaintiff cannot make seduction a substantial part of the action, though it may be pleaded as an element of damage. "It is the breach of the contract of marriage which gives the plaintiff the right of action, and the consequences directly flowing from the breach of that contract constitute the measure of damages, and among the elements of damage it was proper for the jury to consider the sacrifices which the plaintiff had made relying upon the consummation of the promise to marry. \* \* \* The seduction of the plaintiff, in the absence of breach of contract under which the result was accomplished, does not constitute an assault as against the plaintiff. *Disler v. McCauley*, 66 App. Div. 42, 73 N. Y. Supp. 270, 107 St. Rep. 270, reversing 35 Misc. Rep. 411.

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## ARTICLE II.

## REMEDIES.

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## SUBDIVISION 1.

## Criminal Action.

*The criminal action.*— In the State of New York a criminal action lies only when the breach of contract is accompanied by seduction.

Penal Code, § 284. *Seduction under promise of marriage.*— A person who, under promise of marriage, seduces and has sexual intercourse with an unmarried female of previous chaste character, is punishable by imprisonment for not more than five years, or by a fine of not more than one thousand dollars, or by both.

Penal Code, § 285. *Subsequent marriage.*— The subsequent marriage of the parties, or the lapse of two years after the commission of the offense before the finding of an indictment, is a bar to a prosecution for a violation of the last section.

Penal Code, § 286. *No conviction on certain testimony.*— No conviction can be had for the offense specified in section 284, upon the testimony of the female seduced, unsupported by other evidence.

## SUBDIVISION 2.

## No Specific Performance in Modern Law.

The ecclesiastical courts could decree specific performance of a contract to marry in the future when followed by cohabitation, and for some purposes it was regarded as a valid marriage by the common law. But common-law courts never had any authority to decree marriage on the ground of an executory contract to marry, and as we have no tribunal corresponding to the English ecclesiastical courts it follows that our courts have no power to compel performance of such a contract. The only effect of an executory contract is to allow an action for damages in case of breach.

## Art. 2. Remedies.

"Another species of matrimonial causes was, when a party contracted to another brought a suit in the ecclesiastical courts, to compel a celebration of the marriage in pursuance of such contract; but this branch of causes is now cut off entirely by the act for preventing clandestine marriages (26 Geo. II, chap. 33), which enacts, that for the future no suit shall be had in any ecclesiastical court, to compel a celebration of marriage in *facie ecclesiæ* for or because of any contract of matrimony whatsoever." 3 Bl. Comm. 93.

## SUBDIVISION 3.

## Civil Action for Damages.

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§ 1. **Jurisdiction.**—By virtue of section 2862 of the Code of Civil Procedure an action for breach of promise to marry is included in the actions upon contract of which a justice of the peace has no jurisdiction. So, also, jurisdiction is denied to the New York Municipal Court, Albany City Court, Troy Justice's Court, and Municipal Court of Rochester. (See Code, §§ 3215, 3223, 3227.) As to the City Court of New York, see Code Civ. Pro., § 316.

§ 2. **Statute of limitations.**—Code of Civil Procedure, § 382, enumerating actions which must be brought within six years, states—subdivision 3—"An action to recover damages for an injury to property, or a personal injury, except in a case where a different period is expressly prescribed in this chapter." No specific period of limitation for an action of breach of promise to marry is elsewhere prescribed.

The lapse of six years bars an action for fraud on the ground that the defendant had induced the plaintiff to enter into a marriage contract, when the defendant was not able to perform the contract by reason of the fact that he was already married. *Reilly Sabatier*, 26 Civ. Proc. 34, 43 N. Y. Supp. 383.

§ 3. **Survival and assignment.**—The action for breach of promise to marry is a tort in that it is within the rule of "*actio personalis*

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*moritur cum persona.*" *Finlay v. Chirney*, 20 Q. B. Div. 494; *Hovey v. Page*, 55 Me. 142; *Stebbins v. Palmer*, 1 Pick. 71; *Smith v. Sherman*, 4 Cush. 408. But otherwise if special damage to property is involved. *Finlay v. Chirney*; *Stebbins v. Palmer*, *supra*.

Speaking of this rule the court, in *Stebbins v. Palmer*, *supra*, says: "An action for breach of promise of marriage would not survive; for it is a contract merely personal; at least it does not necessarily affect property. \* \* \* The injury complained of is violated faith, more resembling in substance deceit and fraud than a mere common breach of promise."

The cause of action does not survive. *Wade v. Kalbfleisch*, 58 N. Y. 282; *Price v. Price*, 75 N. Y. 244.

By Code of Civil Procedure, § 1910, subd. 1, a cause of action for breach of promise to marry is included among the claims or demands which cannot be transferred.

## ARTICLE III.

## ELEMENTS OF THE WRONG.

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## SUBDIVISION 1.

## Capacity to Contract.

The bearing of infancy upon the validity of the contract is thus stated in *Feibel v. Obersky*, 13 Abb. Pr. (N. S.) 402, note: "Contracts to marry between infants, when both are of the age of consent, if executed, are as binding as if made by adults; but if either party is under the age of consent, both have the privilege of avoiding the contract. The adult has not the privilege in the State of New York. If both parties are above the age of consent, and yet are under legal age, the marriage is valid *provided it be executed*. But if not executed no action is maintainable against the infant to enforce it."

## Art. 3. Elements of the Wrong.

Where defendant was an infant at the time of the promise no action lies, even though the breach was aggravated by seduction. *Leichtweiss v. Treskow*, 21 Hun, 487.

An infant under the age of twenty-one years is not liable in an action for breach of promise to marry. *Contra*, where the person of full age contracts with an infant. Hence an infant may maintain an action for breach of promise against an adult, but an infant defendant is not liable. *Hunt v. Beake*, 5 Cow. 475, citing *Holt v. Ward*, 2 Str. 937; Com. Dig. Inf. B. 6.

The infancy of the plaintiff is no defense to the action. *Willard v. Stone*, 7 Cow. 22.

Promises to marry by those within the prohibited degrees of consanguinity are invalid. *Campbell v. Crampton*, 8 Abb. N. C. (U. S. Cir.) 363, 18 Blatchf. 150.

In jurisdictions where impotency renders a marriage void, a promise by an impotent man has been held invalid. *Gulick v. Gulick*, 41 N. J. L. 13; *Allen v. Baker*, 86 N. C. 91, 41 Am. Rep. 444; *Hall v. Wright*, 96 Eccl. 746; *Voast v. Firth*, L. R., 4 C. P. 8.

It has been held that physical unfitness for the married state on the part of the woman is a defense. *Dring v. Leich*, 112 Pa. St. 245, 56 Am. Rep. 314.

An action for breach of contract to marry between parties in this State cannot be maintained where one of the parties was incapable by law of marrying at the time of making the contract. Though divorced from a former wife, the divorce was granted on the ground of his adultery, and thus he was prohibited from marrying again. So held in an action where the former marriage and the grounds of divorce were known to the plaintiff. *Held*, further, that, even though the proposed marriage was to be celebrated in New Jersey, where it would be valid, it is quite another question whether an action can be maintained in the courts of this State for damages upon breach of a contract made here, to be performed here, and which, by law of this State, is prohibited and declared to be void. Note that the court finds the suggestion as to being married in New Jersey was an afterthought. *Haviland v. Halstead*, 34 N. Y. 643.

If the plaintiff knew that the defendant had a wife living at the time of the promise, there is no contract which could be en-

## Art. 3. Elements of the Wrong.

forced by a court of law. But if a man induces a woman, ignorant of his already being married, to enter into a promise of marriage, she may recover damages for the breach. To hold otherwise, the court said, would be to offer a premium on villainy. *Cammerer v. Muller*, 38 St. Rep. 583, 14 N. Y. Supp. 511.

The fact that the defendant was married at the time of the promise is no defense, if it appears that this fact was not known to the plaintiff. The plaintiff may recover either upon the deceit and damage or upon the contract and promise, which implies and involves a promise and agreement that the defendant was competent legally to marry. The fact that performance by the defendant was impossible and illegal, when unknown to the plaintiff, does not render her agreement illegal. The parties are not *in pari delicto*, and the defendant must restore the plaintiff to what she has lost by his deceit and his promise to do what he legally could not perform. *Blattmacher v. Saal*, 7 Abb. Pr. 409, 29 Barb. 22, citing *Wild v. Harris*, 7 C. B. 999; *Millward v. Littlewood*, 1 Eng. L. & E. 408.

## SUBDIVISION 2.

## Meeting of Minds Essential.

" Though a mutual contract to marry is requisite to sustain the action, no particular form of words is necessary to constitute it. It is sufficient that the acts and language were such that the parties understood and intended an engagement to marry. If such language is used to show the minds of the parties met, it is in law an agreement. Contracts of marriage are unlike all others. They concern the highest interests of human life, and enlist the tenderest sympathies of the human heart, and the acts and declarations done and employed by parties in negotiating them are often correspondingly delicate and emotional. \* \* \* No formal language is necessary to constitute the contract of marriage. If the conduct and declarations of the parties clearly indicate that they regard themselves as engaged, it is not material by what means they have arrived at that state. The court cites and approves the statement of the Lord Chancellor in *Honeyman v. Campbell*, 5 Wils. & Shaw, 144, 2 Dowl. & Clark, 282, as follows: 1. That the contract may be proved by direct or by circumstantial evidence. 2. That there must be a serious promise, intended as such by the person making it, and accepted by the person to whom it is made. 3. That mere

## Art. 3. Elements of the Wrong.

courtship or even an intention to marry is not sufficient to constitute a contract of marriage." "The expressions in some of the cases, that a contract may be inferred from devoted attention, and apparently exclusive attachment, have not been generally adopted by the courts." *Homan v. Earle*, 53 N. Y. 267. But the court cites and approves a statement in *Perkins v. Hersey*, 1 R. I. 493, as follows: "If his conduct was such as to induce her to believe that he intended to marry her and she acted upon that belief, the defendant permitting her to go on trusting that he would carry that intention into effect, that will raise a promise upon which she may recover."

In same case, 13 Abb. Pr. (N. S.) 412, it was said: "In order to entitle the plaintiff to recover, it is necessary to establish a mutual engagement, a promise made and accepted as actual contract. This promise or contract may be express, that is, made in formal terms, or it may be established by circumstances. The word 'implied' should have reference to the kind of proof, the manner of establishing the main fact, namely, the promise or contract, and not to the contract itself." The contract can be made without formal words of request and promise.

It is not indispensable that the promise to marry be express. It may be implied from circumstances; and it may rest partly on both; that is, on express words, and on conduct and acts reasonably leading to the same conclusion. *Hotchkiss v. Hodge*, 38 Barb. 117.

Love on the part of the defendant for the plaintiff is not essential to the maintenance of the action. *Finkelstein v. Barnett*, 17 Misc. Rep. 564, 40 N. Y. Supp. 694.

The jury may infer mutual promises to marry from the defendant's visits to the plaintiff as a suitor and his declaration that he promised to marry her, and where the evidence is conflicting, the question as to whether there was a mutual promise to marry is a question for the jury. *Southard v. Rexford*, 6 Cow. 254.

See *Fowler v. Martin*, 1 T. & C. 377, affirmed, without opinion, in 56 N. Y. 676, for a case where the conduct of the defendant was held sufficient to sustain a verdict for the plaintiff.

It is necessary to show an actual promise to marry in order to support the action. But to do this it is not necessary to prove that the plaintiff, by words, consented to accept the defendant.

## Art. 3. Elements of the Wrong.

The jury may infer her consent from the circumstances. *Wells v. Padgett*, 8 Barb. 323.

In *Yale v. Curtiss*, 151 N. Y. 598, reversing 71 Hun, 436, after a statement of the circumstantial evidence offered in proof of the offer of marriage, the court says: "Formerly contracts of this character were often inferred or implied from proof of such circumstances as usually attend an engagement, but after the statute was changed so as to permit parties to testify in their own behalf they were expected to state all that was said and done so as to remove from the field of speculation facts that had theretofore been inferred, thus leaving the court to determine whether the facts sworn to constituted a contract. In determining this question, however, while we may not imply facts not sworn to, we may infer meaning and intention of the parties. In the absence of fraud and deception, there must be a contract; there must be a meeting of the minds of the contracting parties, and the evidence must be of such a character as to justify a finding that such was the case. No form of words is required. A formal offer and acceptance is not necessary, but there must be an offer and acceptance sufficiently disclosed or expressed to fix the fact that they were to marry, as clearly as if put in formal words. The language used must be such as to show that the minds of the parties met. \* \* \* Mere courtship, or even an intention to marry, is not sufficient to constitute a contract. Thorough acquaintance with character, habits, and disposition is essential in order to make an intelligent contract. The parties, therefore, may form such an acquaintance without having the inferences of a contract attach." *Held*, that the evidence in this case failed to establish a contract.

Where the complaint alleged an unconditional promise to marry, but the evidence shows that the defendant promised to marry the plaintiff "if he ever married," and where he afterward married another person, *held*, that the evidence was not sufficient to uphold a verdict for the plaintiff. It seems that such a promise is void as being in restraint of marriage. *Conrad v. Williams*, 6 Hill, 444.

It has been held in some jurisdictions that a promise to marry on valid and legal contingencies becomes binding like other contracts when the condition is performed, and not before. *Cole v. Cottingham*, 8 C. & P. 75, 34 Eccl. 297; *Frost v. Knight*, 41 L. J. Exch. 78; *Gring v. Lerch*, 112 Pa. St. 224, 56 Am. Rep. 314. It has been held that express agreements that the marriage be cele-



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 Art. 3. Elements of the Wrong.
 

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brated according to the rites of a particular church are binding. *Stone v. Appel*, 12 Ill. App. 582. Thus a valid conditional promise must be distinguished from conditions which are held to invalidate contracts as being in restraint of marriage, or conditions made upon immoral considerations.

## SUBDIVISION 3.

## Consideration.

A promise to marry in consideration of [future] illicit intercourse is without consideration, and void. *Lewis v. Goetschius*, 20 Week. Dig. 140.

Where one of the considerations of the contract is that the plaintiff would have carnal connection with the defendant, the plaintiff cannot recover. Where part of the consideration of the contract is good, but the remaining part is grossly immoral, and the two parts are joined as one transaction, the entire contract fails. The court said, in speaking of the plaintiff's attitude: "It does not seem to have occurred to him that such a rule would tend to legalize contracts for prostitution, or that the principle in view is never applied to an agreement tainted with immorality. Courts of justice will not aid the illicit or corrupt arrangement, or sift out one part of it to save the other part. When a portion of the consideration is valid, and the other *malum in se*, the failure is entire." *Steinfeld v. Levy*, 16 Abb. Pr. (N. S.) 26.

A promise to marry based merely upon consideration of illicit and adulterous intercourse is void because of the immorality of the consideration. *Button v. Hibbard*, 82 Hun, 289, 31 N. Y. Supp. 483, 64 St. Rep. 80. In this case the plaintiff testified that the defendant promised "he would marry her if she would be seduced by him." Judgment for the defendant was, however, reversed on appeal, because the trial court made an error in assuming that the seduction was the only evidence in the case from which a promise to marry could be inferred. There was evidence that the defendant had shown attention to the plaintiff for a considerable time; had escorted her to church, proposed to purchase a wedding dress, etc. *Held*, that the jury would have been warranted in finding a promise to marry from these facts, and it was error to direct a verdict for the defendant. *Button v. Hibbard*, 82 Hun, 289, 31 N. Y. Supp. 483, 64 St. Rep. 80.

But the fact that the promise to marry was made *after* the plain-

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Art. 3. Elements of the Wrong.

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tiff had been seduced by defendant, and in consequence thereof, does not render the agreement invalid. It is not open to the objection that it encourages immorality, because the wrong has been already perpetrated. It merely shows that the seducer was willing to make his victim the only recompense which the circumstances permitted. *Hotchkiss v. Hodge*, 38 Barb. 117.

The provisions of the statute of frauds, providing that every agreement not to be performed within one year from the making thereof shall be void unless some note or memorandum thereof be in writing and subscribed by the party to be charged, does not apply to an agreement to marry. Nor is an agreement to marry an agreement "in consideration of marriage" within the meaning of the statute. *Buck v. Gannar*, 36 Hun, 52.

**SUBDIVISION 4.****Breach of Contract by Defendant.**

An action will lie at once on the positive refusal of the defendant to perform the contract, even though the time specified for the performance has not arrived. So held, in a case where the engagement had been to marry "in the fall," but the defendant informed the plaintiff in October that he would not perform the contract. *Burtis v. Thompson*, 42 N. Y. 246.

Where the parties were engaged in 1866, and in 1867 agreed that the marriage should take place in 1868, and where, in the fall of 1867, the plaintiff became pregnant, *held*, that no right of action accrued until the fall of 1868, in the absence of a specific agreement to marry at any other time than the one previously agreed upon, and that an action brought before that time was premature. *McMurray v. McManus*, 1 Alb. L. J. 102.

The fact that the plaintiff consents to the postponement of the wedding day does not relieve defendant from his promise. *Nearing v. Van Fleet*, 71 Hun, 137, 54 St. Rep. 308, 24 N. Y. Supp. 531, affirmed 151 N. Y. 643.

After the defendant had once broken his promise, an offer to renew it is no defense in an action for the breach. *Southard v. Rexford*, 6 Cow. 254.

Breach of contract by the defendant may be shown by circumstantial evidence. And where the refusal is in question, it is for the jury to decide on all the facts. *Hibbard v. Bonesteel*, 16 Barb. 360, citing *Willard v. Stone*, 7 Cow. 22.

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 Art. 3. Elements of the Wrong.
 

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The defendant's ill-health may be a justification for the postponement of the marriage day where the same has not been set, and may warrant a reasonable delay. But delay, accompanied by written correspondence, and by actions which clearly ignore the engagement, is equivalent to a refusal, and constitutes a breach sufficient to enable an action to be maintained. *Campbell v. Arbuckle*, 21 St. Rep. 412, 4 N. Y. Supp. 39, affirmed in 123 N. Y. 662.

Speaking of a case where the defendant was already married, unknown to the plaintiff, when he made the promise of marriage, the court, in *Cammerer v. Muller*, 38 St. Rep. 583, 14 N. Y. Supp. 511, said: "The very instant that this defendant made the contract with the plaintiff, that contract was broken by him. He knew that it was impossible for him to carry it out."

Where the defendant is unable to make his promise good, owing to the fact that he is already married, which fact is not known to the plaintiff, she is not bound to tender performance upon her part or to request performance on his. *Kerns v. Hagenbuchle*, 42 St. Rep. 210, 60 N. Y. Super. 222.

The pre-engagement on the part of defendant is no defense. "Precontract is a disability, but it will not avoid the performance of your promise, because it proceeds from your own act." Holt, Ch. J., in *Harrison v. Cage*, 1 Ld. Raym. 387, cited, with approval, in *Kerns v. Hagenbuchle*, 42 St. Rep. 210.

#### SUBDIVISION 5.

##### Plaintiff Must Show Offer of Performance.

Where the defendant has not refused or put it out of his power to perform the contract of marriage, the plaintiff, to recover, must prove not only that she was willing and ready to perform, but also an offer of performance. *Cushman v. Burritt*, 14 Week. Dig. 59.

In *Johnson v. Caulkins*, 1 Johns. Cas. 116, it was held that the plaintiff need not show an offer of marriage upon her part where the defendant had put it out of her power to do so by absconding.

It is an answer to the complaint that the plaintiff, upon her part, refused to marry the defendant, and continued to refuse up to the time of the commencement of the action. *Liefmann v. Solomon*, 7 Abb. Pr. 409.

The plaintiff is not bound to tender performance upon her part, nor to request performance upon the part of the defendant, where

## Art. 4. Defenses.

the defendant is unable to marry by reason of the fact that he is already married. The plaintiff's cause of action accrues the moment she discovers this inability. *Kerns v. Hagenbuchle*, 42 St. Rep. 210, 60 N. Y. Super. 222, 17 N. Y. Supp. 367.

In *Willard v. Stone*, 7 Cow. 22, it was held that a tender of marriage on the part of the plaintiff was not necessary. Note that in this case the defendant broke off all engagement to the plaintiff, and upon request would not explain why.

## ARTICLE IV.

## DEFENSES.

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## SUBDIVISION 1.

## Contract not Valid, or Rescinded.

No action lies on a promise by the defendant to marry "if he ever marries." Such a contract, it seems, is void as being in restraint of marriage. *Conrad v. Williams*, 6 Hill, 444.

It is a good answer in an action for breach of promise to marry that the defendant, "being then sole and unmarried, and ready to marry her, she, the plaintiff, then and there refused and, up to and at the time of the commencement of this action, continued to refuse to marry him, the said defendant." So held on demurrer to an answer containing the above allegations, and which admitted the promise to marry. *Liefmann v. Soloman*, 7 Abb. Pr. 409, note.

It is, of course, a defense that the contract was rescinded by mutual consent. 4 Am. & Eng. Encyc. of Law (2d ed.), 595, citing *King v. Gillette*, 7 M. & W. 55; *Grant v. Willey*, 101 Mass. 356.

Where the evidence is conflicting, it is a question for the jury as to whether the engagement had been rescinded by mutual consent, or had been broken off by the plaintiff before any breach on the part of defendant. *Southard v. Rexford*, 6 Cow. 254.

As to the validity of a promise obtained by force or duress, see *McCrum v. Hildebrandt*, 85 Ind. 204.

## Art. 4. Defenses.

Where the complaint states that the promise of marriage was in consideration that the plaintiff would have carnal connection with the defendant, the plaintiff cannot recover, even though a part of the consideration for the agreement is good. *Steinfeld v. Levy*, 16 Abb. Pr. (N. S.) 26. See cases under "Consideration."

## SUBDIVISION 2.

## Incapacity of Defendant to Make Contract.

An infant under the age of twenty-one years is not liable in action for breach of contract to marry. *Contra*, where a person of full age contracts with an infant. Hence an infant may maintain an action for breach of promise against an adult, but an infant defendant is not liable. *Hunt v. Beake*, 5 Cow. 475, citing *Holt v. Ward*, 2 Str. 937; Com. Dig. Inf. B. 6.

The infancy of the plaintiff is a defense to the action. *Willard v. Stone*, 7 Cow. 22.

See cases under "Capacity to Contract — Infancy."

If the plaintiff knows that the defendant had a wife living at the time of the promise of marriage, there is no valid contract which could be enforced in a court of law. Otherwise if she was ignorant of the fact and the defendant deceived her in this respect. *Cammerer v. Muller*, 38 St. Rep. 583, 14 N. Y. Supp. 511.

Inability on the part of the defendant to marry because he is already married is only a defense where the former marriage was known to the plaintiff. *Kerns v. Hagenbuchle*, 42 St. Rep. 210, 60 N. Y. Super. 222, 17 N. Y. Supp. 367.

It is a defense to an action for breach of promise to marry where the plaintiff knew that the defendant was divorced from his former wife, such divorce being granted on the ground of his adultery. This is so even though the marriage was to be performed in New Jersey, for it seems that the plan of going to New Jersey was subsequent to the original engagement. The court said: "Can the aid of the courts of this State be invoked to award her damages for the breach of a contract more honored in its breach than it would be in its observance? Clearly not; neither can the contract be validated on the ground that it was to be performed in another State." *Haviland v. Halstead*, 34 N. Y. 643.

## Art. 4. Defenses.

## SUBDIVISION 3.

## Bad Character of Plaintiff.

In *Boynton v. Keller*, 3 Mass. 189, it was held (1) that if the woman was of bad character at the time of the contract, and that fact was unknown to the defendant, the verdict should be in his favor; (2) that if the plaintiff, after the promise, had prostituted her person to any one other than the defendant, she thereby discharged the defendant; (3) that if her conduct was improperly indelicate, although not criminal before the promise, and it was unknown to the defendant, it ought to be considered in mitigation of damages; (4) that if such was her conduct after the promise, it was proper, in the same view, for the consideration of the jury.

Where it is shown that the plaintiff has been guilty of immoral conduct with other men, the verdict should be for the defendant, or at least the conduct should be considered in mitigation of damage. *Palmer v. Andrews*, 7 Wend. 142. See *Willard v. Stone*, 7 Cow. 22.

## SUBDIVISION 4.

## Partial Defenses in Mitigation.

The fact that the plaintiff drank intoxicating liquors and sometimes got intoxicated is admissible in mitigation of damage, though not pleaded; and any misconduct showing that the plaintiff would be an unfit companion in married life may be given in mitigation. *Button v. McCaulay*, 1 Abb. Dec. 282, 5 Abb. Pr. (N. S.) 29, reversing 38 Barb. 413.

It may be shown in mitigation of damage that the defendant was afflicted with an incurable disease. *Mabin v. Webster*, 129 Ind. 430; *Allen v. Baker*, 86 N. C. 91, 41 Am. Rep. 444.

Declarations of the defendant tending to show that his failure to marry the plaintiff proceeded from no want of respect or attachment goes in mitigation of damages. *Johnson v. Jenkins*, 24 N. Y. 252.

The defendant is entitled to show in mitigation of damages that his mother, a woman in infirm health, was strenuously opposed to the marriage. *Johnson v. Jenkins*, 24 N. Y. 252.

It is immaterial that the defendant bore no love to the plaintiff. The action lies for damages to the sensibilities of the plaintiff, not to those of the defendant. *Getzelson v. Bernstein*, 15 Misc. Rep. 627, 37 N. Y. Supp. 220, 72 St. Rep. 799.

After the defendant had once broken his promise, an offer to

## Arts. 5, 6. Parties. Pleading.

renew it is no defense to an action for the breach. *Southard v. Rexford*, 6 Cow. 254.

**ARTICLE V.****PARTIES.**

**Plaintiffs:** Unlike the action for seduction, breach of promise of marriage may be brought by the woman injured. It also lies equally on the complaint of either party.

**Defendants:** Though usually brought against the party making the breach, third parties instigating the breach or guilty of fraud in the premises, may be liable. See Cooley on Torts (2d ed.), 277; also, "Nature of the Action."

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**SUBDIVISION 1.****Complaint.**

A complaint which alleges mutual promises to marry on request of plaintiff and defendant; that the plaintiff was ready and willing to fulfill and the defendant refused to do so, states a cause of action for breach of promise. *Held*, further, that allegations of seduction in the complaint, though available in aggravation of damage, did not constitute an independent cause of action. *Getzelson v. Bernstein*, 15 Misc. Rep. 627, 37 N. Y. Supp. 220, 72 St. Rep. 799.

A complaint is not demurrable because it shows the defendant was married at the time of the promise, if it appears that that fact was not known to the plaintiff. The court said: "This is a good cause of action, and the plaintiff may recover either upon the deceit and damage, or upon the contract and promise to marry, which implied and involved a promise and agreement that the defendant was competent legally to marry. It is said that the performance of the agreement was impossible and illegal. But this was unknown to the plaintiff, and her agreement was not illegal." *Blattmacher v. Saal*, 7 Abb. Pr. 409, 29 Barb. 22.

A divorced woman may maintain an action for breach of promise in her maiden name. *Rich v. Mayer*, 26 St. Rep. 107, 7 N. Y. Supp. 70.

## Art. 6. Pleading.

Sexual intercourse may be shown under a complaint failing to allege the same. *Jennette v. Sullivan*, 63 Hun, 361, 43 St. Rep. 641, 18 N. Y. Supp. 266.

See *Buzzard v. Knapp*, 12 How. Pr. 504, where the complaint was held not to state a cause of action because it set out evidence rather than a concise statement of the facts constituting the cause of action.

## SUBDIVISION 2.

## Answer.

A partial defense may be set forth, as prescribed in the last section; but it must be expressly stated to be a partial defense to the entire complaint, or to one or more separate causes of action, therein set forth. Upon a demurrer thereto, the question is, whether it is sufficient for that purpose. Matter tending only to mitigate or reduce damages, in an action to recover damages for the breach of a promise to marry, or for a personal injury, or an injury to property, is a partial defense, within the meaning of this section. (Code of Civ. Proc., § 508.)

In an action to recover damages for the breach of a promise to marry, or for a personal injury, or an injury to property, the defendant may prove, at the trial, facts, not amounting to a total defense, tending to mitigate or otherwise reduce the plaintiff's damages, if they are set forth in the answer, either with or without one or more defenses to the entire cause of action. A defendant, in default for want of an answer, may, upon a reference or inquiry to ascertain the amount of the plaintiff's damages, prove facts of that description. (Code of Civ. Proc., § 536.)

Improper conduct on the part of the plaintiff, or criminal intercourse with other men, cannot be shown under a general denial as a defense; though it seems it may be shown in mitigation of damage. *Kniffen v. McConnell*, 30 N. Y. 285.

Where the complaint alleged the plaintiff's chastity, an allegation in the answer denying the same and affirmatively pleading the plaintiff's profligacy, and that she had been repeatedly committed by police magistrates, cannot be stricken out as irrelevant, redundant, or scandalous because the defendant is entitled to traverse the allegations of the complaint, and the allegations as to misconduct were relevant in mitigation of damages, though not properly pleaded in form as a partial defense. *Keegan v. Sage*, 31 Abb. N. C. 54, 25 N. Y. Supp. 78.



## Art. 6. Pleading.

## FORMS.

## SUPREME COURT — COUNTY OF WESTCHESTER.

ANN HAVILAND

*agst.*

DAVID P. HALSTEAD.

Complaint, 34 N. Y. 643.

The plaintiff, Ann Haviland, complains and shows to this court, that on or about the 9th day of July, 1856, in consideration that the plaintiff, who was then sole and unmarried, at the request of the defendant, would marry him on request, the defendant, David P. Halstead, promised to marry the plaintiff on request, and the said plaintiff, confiding in the said promise and undertaking of the said defendant, has always from thence hitherto remained and continued and still is sole and unmarried, and has been ready and willing to marry the said defendant; yet the said defendant, not regarding his said promise and undertaking, and after making the same, to wit: on the 24th day of February, 1857, wrongfully and injuriously married a certain other person, to wit: one Fanny A. Cooley, contrary to his said last promise and undertaking so by him made, as aforesaid, to the damage of the plaintiff \$6,000.

WHEREFORE the plaintiff demands judgment against the said defendant for the sum of \$6,000, besides the costs of this action.

(Verification.)

JOHN I. CLAPP,

*Plaintiff's Attorney.*

**Complaint Alleging Breach, Marriage with Other Woman; also  
Seduction in Aggravation.**

## SUPREME COURT — COUNTY OF MONTGOMERY.

LIBBIE E. BUTTON, Plaintiff,

*agst.*

CHARLES M. HIBBARD, Defendant.

Complaint, 82 N. Y. 289.

The plaintiff complaining of the defendant alleges:

*First.* That heretofore and on or about the 24th of June, 1891, in consideration that the plaintiff who was then sole and unmarried, at the request of the defendant, would marry him on request, the defendant promised the plaintiff to marry the plaintiff on request.

## Art. 6. Pleading.

*Second.* That the said plaintiff confiding in the said promise and undertaking of the said defendant has always from thence hitherto remained and continued and still is sole and unmarried, and has been from thence ready and willing to marry the said defendant.

*Third.* That the said defendant not regarding his said promise and undertaking, and after making the same, to wit, on or about the 30th of November, 1892, wrongfully and injuriously married a certain other person, to wit, one Ellen R. Mallet, contrary to his said promise and undertaking so by him made as aforesaid.

*Fourth.* That said defendant, through said promise of marriage, and by repeating said promise of marriage, seduced this plaintiff and had illicit intercourse with her, whereby the said plaintiff became pregnant and sick with child, and was on the 18th day of June, 1892, delivered of a child, of which she was pregnant as aforesaid.

*Fifth.* That the plaintiff has suffered damage by reason of the facts alleged in said premises, in the sum of \$5,000.

WHEREFORE plaintiff demands judgment against the defendant for the sum of \$5,000, besides the costs of this action.

(Verified.)

HUSTON & HERRICK,  
*Plaintiff's Attorneys.*

**Answer Alleging Impossibility of Performance Known to Plaintiff; also Her Unfitness.**

SUPREME COURT.

ANN HAVILAND

*agst.*

DAVID P. HALSTEAD.

} Answer, 34 N. Y. 643.

The defendant, David P. Halstead, answers the complaint of the plaintiff, in this action:

*First.* The defendant, answering, says, that he denies that on or about the 9th day of July, 1856, or at any other time, in consideration that the plaintiff would marry him on request, he, the defendant, promised to marry the plaintiff on request; but this defendant avers, that he never at any time promised or contracted to marry the plaintiff in the State of New York, or under, or according to the laws thereof, but that on the contrary, before any arrangement was made between the parties, the plaintiff was informed and well knew that the defendant was prohibited by the laws of the State of New York from marrying, for reasons hereinafter stated.

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Art. 6. Pleading.

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*Second.* That any agreement or promise made was upon the express mutual understanding, that if entered into, such marriage should take place and be celebrated in and under the laws of the State of New Jersey, or some State other than New York.

*Third.* The defendant for a further and separate answer to the complaint alleges, that at the time of the making of the alleged promise of marriage set forth in the complaint, the defendant was under a disability to marry, by the laws of the land, and the decree of the Court of Chancery of the State of New York.

*Fourth.* The defendant further answering, says that at the time of making the said promise of marriage aforesaid, this fact was well known to the plaintiff in this action; that in consequence of said decree and judgment of the Court of Chancery, the said promise of marriage was illegal and void, all of which was well known to the plaintiff.

The defendant, therefore, claims that the complaint be dismissed, with costs.

(Verified.)

EDWARD WELLS,  
*Defendant's Attorney.*

*Answer alleging refusal of plaintiff to fulfill promise of marriage, sustained on demurrer. Liefmann v. Solomon, 7 Abb. Pr. 409, note.*

"That after the making of the alleged promises by the defendant to the plaintiff, set forth in the complaint in this action, and before the commencement of this action, that is to say, on or about the 1st day of August, in the year 1857, and at the city of New York, he, the defendant, being then sole and unmarried, and ready to marry her, she, the plaintiff, then and there, refused, and up to and at the time of the commencement of this action, continued to refuse to marry him, the said defendant. And the defendant says that the plaintiff has not sustained any damages stated in the complaint."

## Art. 7. Evidence.

## ARTICLE VII.

## EVIDENCE.

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## SUBDIVISION 1.

## Of the Contract.

Declarations of the defendant that he would make a good home for the plaintiff, made at a time and as part of the conversations relied upon as showing the promise, are admissible in connection with other conversations as tending to prove the contract. *Button v. McCaulay*, 1 Abb. Dec. 282, 5 Abb. Pr. (N. S.) 29, reversing 38 Barb. 413.

In *Roe v. Doe*, 33 St. Rep. 41, 11 N. Y. Supp. 336, it was stated that the fact that the defendant frequently visited plaintiff's house; went with her to entertainments and made her presents, etc., may tend to show that there is an existing intention to marry, where the young man and woman were pure and moral; yet the force of such circumstances is greatly weakened where all the time the parties had been indulging in illicit sexual intercourse. The latter accounts for frequent visits, going to places of entertainment, and is abundant reason for presents far more valuable than were proven in the action.

Where the alleged promise is established by the testimony of the plaintiff alone it is not necessary that it should be corroborated by other witnesses. "We do not think it unusual or strange that the engagement was not made in the presence of third parties." In any event the conduct of the parties may corroborate the plaintiff's testimony. *Nearing v. Van Fleet*, 71 Hun, 137, 54 St. Rep. 308, 24 N. Y. Supp. 531, affirmed in 151 N. Y. 643.

Preparations for the wedding, such as making wedding cake, preparing dresses, etc., are facts tending to show the promise and acceptance. *Wilcox v. Greene*, 23 Barb. 639.

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Mere proof of seduction is not proof of the contract to marry, and the jury cannot be allowed to found a verdict upon the seduction. The plaintiff was bound to prove the contract by a preponderance of evidence. *Roe v. Doe*, 33 St. Rep. 41, 11 N. Y. Supp. 336.

Where the time of the promise of marriage was alleged as being in 1869, and at divers times prior thereto in the years 1868, 1869, it was held that evidence of promises in 1866 was not a material variance, it not appearing that the defendant was misled to his prejudice. *Fowler v. Martin*, 1 T. & C. 377, affirmed, without opinion, in 56 N. Y. 676.

Where it was proved that the uncle and aunt of the plaintiff, in her presence, and without her objection, asked the defendant to marry her, which he refused, and the plaintiff then said: "I don't want your money, I want your word and honor that you promised me," and he answered: "There is no use in talking; I cannot marry you now." *Held*, that there was evidence enough for the jury as to whether there was a request on the part of the plaintiff that the defendant marry her. *Kniffen v. McConnell*, 30 N. Y. 285.

Where the letters and acts of the plaintiff were of a character likely to result from an improper intimacy, and were of a nature inconsistent with the engagement, and contained no allusion to marriage, the verdict for the plaintiff was held to be against the evidence. *Roe v. Doe*, 33 St. Rep. 41, 11 N. Y. Supp. 336.

## SUBDIVISION 2.

## Of the Character and Conduct of Plaintiff.

Evidence of lewd conduct on the part of the plaintiff for the purpose of showing criminal intercourse with other men is not admissible under a general denial. But it seems that such evidence may be received in mitigation of damage. *Kniffen v. McConnell*, 30 N. Y. 285.

Evidence of adultery by the plaintiff in a former marriage, and more than twenty-five years previous to the action, is admissible in mitigation of damages, although no such defense is pleaded. *Tompkins v. Wadley*, 3 T. & C. 424. But it was held that the trial judge had discretion to limit the inquiries as to the character of the plaintiff within twelve years previous to the time of trial, and that for such inquiry to be unlimited there must be shown

## Art. 7. Evidence.

to exist some connection between the past and present period, or that present character may be inferred fairly from the previous bad character.

The defendant may show lewdness and improper conduct on the part of the plaintiff, not only previous to but subsequent to the breach of the contract. The court considers the action as brought not only for compensation for the immediate injury, but also for damages for loss of reputation. But this reputation must necessarily depend upon the general conduct of the parties subsequent as well as previous to the injury complained of. *Willard v. Stone*, 7 Cow. 22. See also *Palmer v. Andrews*, 7 Wend. 142.

In *Willard v. Stone*, 7 Cow. 22, it was held that the defendant could not prove that during his absence from the neighborhood he heard rumors and reports that he was supplanted in the plaintiff's affections by another person; nor that her conduct was spoken of with disapproval. If her conduct was improper the defendant should and might have proved the fact, but the plaintiff ought not to suffer from the unfounded calumnies which may have been propagated against her.

It is error to prevent a witness from testifying as to whether he ever knew of any person having criminal intercourse with the plaintiff, where the testimony is ruled out upon the ground that the answer would incriminate the witness. The witness is not bound to answer such question so far as it will incriminate himself, but it is duty of the court to apprise him to that effect, and if he sees fit he may waive his privilege. It is not the right or duty of the court to enforce it upon him. *Southard v. Rexford*, 6 Cow. 254.

The unchastity or immorality of the plaintiff may be shown by the defendant. *McKee v. Nelson*, 4 Cow. 354.

The defendant in mitigation of damages may show the lascivious conduct of the plaintiff without reference to the time he made the promise to her or as to the period of the proposed marriage. *Johnson v. Caulkins*, 1 Johns. Cas. 116.

Evidence that the plaintiff drank intoxicating liquors to excess and sometimes got intoxicated is admissible under general denial, not as a defense, but in mitigation of damages. So, too, any misconduct of the plaintiff showing that she would be an unfit companion in married life may be given in mitigation. Nor is the defendant bound to specify that he offered such evidence in miti-

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gation; if the evidence is competent for any purpose and is rejected it is error. *Button v. McCaulay*, 1 Abb. Dec. 282, 5 Abb. Pr. (N. S.) 29, reversing 38 Barb. 413.

Evidence of sexual intercourse between the parties may be shown by the plaintiff, even though the complaint fails to allege it. The testimony is relevant as part of the history of the relations between the plaintiff and defendant, and also because the jury may consider such evidence upon the question of damage. *Jennette v. Sullivan*, 63 Hun, 361, 43 St. Rep. 641, 18 N. Y. Supp. 266.

Seduction under promise of marriage may be shown in aggravation of damage. *Kniffen v. McConnell*, 30 N. Y. 285.

The fact that the defendant's promise was made with a view to seducing the plaintiff, and that by means of promises he had so seduced her, may be shown in aggravation of damage. *Wells v. Padgett*, 8 Barb. 323.

It is not error to allow plaintiff to testify that she was pregnant by the defendant prior to his promise to marry. *Hotchkins v. Hodge*, 38 Barb. 117.

**SUBDIVISION 3.****Of the Character and Conduct of Defendant.**

Evidence of the defendant's treatment of other women is not admissible unless it is shown that the plaintiff knew thereof, in which case it might be notice to the plaintiff that the defendant's attentions did not indicate an intention to marry her. *Crosier v. Craig*, 47 Hun, 83.

The fact that the failure of the defendant to marry the plaintiff was caused by no want of respect or attachment may be shown in mitigation of damage. *Johnson v. Jenkins*, 24 N. Y. 254.

Where the defendant proved that the plaintiff drank intoxicating liquors to excess and sometimes got intoxicated, it was held that if the plaintiff claimed that the intoxication was connived at by the defendant, the burden of proof was upon her to show it. *Button v. McCaulay*, 1 Abb. Dec. 282, 5 Abb. Pr. (N. S.) 29, reversing 38 Barb. 413.

**SUBDIVISION 4.****Of the Mutual Attachment of the Parties.**

In *Tompkins v. Wadley*, 3 T. & C. 424, it was held that the witness could not testify as to her opinion of the state of the plain-

## Art. 7. Evidence.

tiff's affections toward the defendant where she was not shown to have had an intimate acquaintance with the defendant so as to qualify her to give an opinion. The statement in 1 Greenl. Ev., § 440, is criticised "In an action for breach of promise to marry, a person accustomed to observe the mutual deportment of the parties may give in evidence his opinion upon the question whether they were attached to each other." The decision in *Tompkins v. Wadley* seems to turn upon the fact that the witness was not "accustomed to observe the mutual deportment of the parties."

A witness who lives with the plaintiff may give his opinion, founded upon observation of her deportment, that she was sincerely attached to the defendant. *McKee v. Nelson*, 4 Cow. 354.

The plaintiff may testify that she became attached to the defendant, where his answer alleges that she never had any affection for him and evidence was introduced to sustain such allegation. *Chellis v. Chapman*, 26 St. Rep. 953, 7 N. Y. Supp. 78. Affirmed, 125 N. Y. 214.

Where the complaint alleges mutual love and affection between the parties, and the answer fails to deny such allegation, proof thereof is unnecessary. *Finkelstein v. Barnett*, 16 Misc. Rep. 488, 38 N. Y. Supp. 961, 74 St. Rep. 551.

It is not necessary to show that the contract of marriage ripened into mutual love and affection. It is immaterial whether the defendant was in love with the plaintiff. *Getzelson v. Bernstein* 15 Misc. Rep. 627, 37 N. Y. Supp. 220, 72 St. Rep. 799; *Finkelstein v. Barnett*, 17 Misc. Rep. 564, 40 N. Y. Supp. 694.

## SUBDIVISION 5.

## Of the Social and Financial Status of Defendant.

It is well settled that evidence tending to show the defendant's financial condition is admissible in an action for breach of promise as it tends to show what the plaintiff lost in the way of maintenance, position, and support by the breach of defendant. *Held*, however, that where the plaintiff was allowed to testify to declarations of the defendant to the effect that he was the only heir of his uncle, who would leave him a large estate, that the evidence was immaterial and a reversible error, as it is impossible to say it did not increase the verdict. *Held*, also, it was error to allow the plaintiff to testify "I heard that he was a very rich man;" that this did not tend to show general reputation; it is merely hearsay. It seems,



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however, that declarations of the defendant as to specific property, etc., might be admissible. *Totten v. Read*, 32 St. Rep. 46, 10 N. Y. Supp. 318, 16 Daly, 282.

Evidence of the defendant's financial standing should be confined to general reputation; to that extent it is admissible. *Kniffen v. McConnell*, 30 N. Y. 285.

Evidence of defendant's general reputation as to wealth is competent upon the question of damages in an action for breach of promise to marry. *Chellis v. Chapman*, 125 N. Y. 214, 35 St. Rep. 171, affirming 26 St. Rep. 953, 7 N. Y. Supp. 78.

Where the defendant married a woman other than the plaintiff, evidence of the wealth of the defendant's wife is not admissible to show the motive of defendant or his social position. *Crandall v. Quinn*, 19 J. & S. 276.

While evidence of the reputed amount of defendant's property is competent because accurate knowledge of the amount is in most cases confined to the defendant and his friends, yet it is not improper to permit the amount of the property in defendant's possession to be shown by direct and precise evidence; for example, witness was allowed to testify that the defendant's farm and personal property were worth about \$8,000. *Crosier v. Craig*, 47 Hun, 83.

Evidence of the pecuniary circumstances of the defendant's mother is incompetent. *Aldis v. Stewart*, 4 Misc. Rep. 389, 53 St. Rep. 518, 24 N. Y. Supp. 239. Nor is such error cured by a direction of the judge to the jury to disregard it if it can be seen that such evidence affected the verdict.

**SUBDIVISION 6.****Of Damage.**

The loss of plaintiff's health is not a direct, natural, and necessary consequence of the breach of promise to marry, and proof thereof is inadmissible unless such damages are specially claimed. *Bedell v. Powell*, 13 Barb. 183.

On the question of damage the jury may consider a letter written by the defendant purporting to contain a proposal for her to become his mistress instead of his wife. *Campbell v. Arbuckle*, 21 St. Rep. 412, 4 N. Y. Supp. 39, affirmed 123 N. Y. 662.

It is not necessary to show that the plaintiff suffered anguish of mind. *Getzelson v. Bernstein*, 15 Misc. Rep. 627, 37 N. Y. Supp. 220, 72 St. Rep. 799.

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The strenuous opposition of the defendant's mother to the marriage may be shown in mitigation of damages. *Johnson v. Jenkins*, 24 N. Y. 254.

The father of the defendant may show that he remonstrated with the defendant against the marriage, but should not be allowed to specify immoral conduct as a ground of such remonstrance unless he personally knows the ground to be true. *McKee v. Nelson*, 4 Cow. 354.

**SUBDIVISION 7.****Miscellaneous.**

Proof that the contract was dependent upon the deposit of a sum of money by the plaintiff with the defendant, and that such sum was deposited, is admissible as part of the *res gestæ*. *Getzelson v. Bernstein*, 15 Misc. Rep. 627, 37 N. Y. Supp. 220, 72 St. Rep. 799.

All the circumstances attending the breaking off of the engagement are part of the *res gestæ*. *Johnson v. Jenkins*, 24 N. Y. 252.

Where on cross-examination the plaintiff testified that she would not now marry the defendant, she may on redirect-examination give the reasons therefor. *Chellis v. Chapman*, 26 St. Rep. 953, 7 N. Y. Supp. 78.

Where the defendant asked a third person to intercede for him with the plaintiff, such person may testify that she communicated his conversation to the plaintiff. *Chellis v. Chapman*, 26 St. Rep. 953, 7 N. Y. Supp. 78.

Evidence is admissible to show that the defendant induced the plaintiff to give him custody of her money and that he spent the same. This is part of the *res gestæ* and shows intent. *Finkelstein v. Barnett*, 16 Misc. Rep. 488, 38 N. Y. Supp. 961, 74 St. Rep. 551.

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## ARTICLE VIII.

## PROCEDURE AND TRIAL.

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## SUBDIVISION 1.

## Arrest and Attachment, etc.

The Code, § 549, includes among the actions where the defendant may be arrested the action to recover damages for "breach of promise to marry."

By section 635 of the Code of Civil Procedure a warrant of attachment is prohibited in actions upon a contract to marry.

An open commission may be granted to the defendant to take testimony as to the plaintiff's character in an action for breach of promise. *Burnell v. Coles*, 25 Misc. Rep. 409, 88 St. Rep. 940, 54 N. Y. Supp. 940.

## SUBDIVISION 2.

## Charge.

It is proper to charge that if the defendant comes into court and attempts to prove the plaintiff guilty of misconduct with other men, of which charge he knew she was innocent, and if the misconduct was committed by himself, it aggravates the injury and strengthens the claim to damage, although such misconduct is not set up in the answer. *Kniffen v. McConnell*, 30 N. Y. 285.

Where the pregnancy of the plaintiff was a conceded fact and the judge charged that if the jury were satisfied that the defendant was not the father of the child, they should find for the defendant. *Held*, that there was ground for criticism; that under the facts the defendant was not to prove that he was not the father of the child, but it was for the plaintiff to prove that he was. *Kniffen v. McConnell*, 30 N. Y. 285.

It is proper for the court to charge that if the defendant alleges the unchastity of the plaintiff in his answer by way of justifica-

## Art. 8. Procedure and Trial.

tion, and fails to prove such fact, the allegation may be considered by the jury in aggravation of damage. *Thorn v. Knapp*, 42 N. Y. 474, citing *Parsons on Contracts*, 551.

In *Chellis v. Chapman*, 125 N. Y. 214, 35 St. Rep. 171, affirming 26 St. Rep. 953, a charge was upheld where the jury were instructed, in substance, that if the plaintiff was entitled to damages, they (jury) would certainly give compensatory damages, and that in the exercise of their discretion, based on the proofs and circumstances of the case, they might award exemplary damages.

Where the plaintiff testified that the defendant made an express promise to marry, and made no claim of an implied promise, it was held not to be error to charge that the jury could find for the plaintiff only in case they found an express promise. *Sause v. Morris*, 19 J. & S. 41.

Where it appeared that the plaintiff had destroyed certain of the defendant's letters,—*Held*, that it was no error for the court to refuse to charge that the destruction of such letters showed an intent to destroy others, and was a strong circumstance against the truth of the plaintiff's testimony. *Held*, further, that the destruction of the letters raised no presumption against the plaintiff in the absence of anything showing that she destroyed letters containing evidence against her, or at least letters required by defendant to be produced upon the trial. *Fowler v. Martin*, 1 T. & C. 377, affirmed, without opinion, in 56 N. Y. 676.

It was held to be error to charge that if under all the circumstances the jury found that the defendant had wronged the plaintiff purposely and intentionally, if his conduct was malicious, they were bound to give exemplary damages: (1) such sum as you think it is proper for the malice of the conduct; (2) as an example to prevent other men in like case attempting the same thing. The error lay in depriving the jury, in case they found the facts, of all discretion on the question whether exemplary damages should or should not be given. *Held*, further, that the error was a radical one. *Jacobs v. Sire*, 4 Misc. Rep. 398, 53 St. Rep. 515, 23 N. Y. Supp. 1063.

Where it was shown that the plaintiff had been guilty of indecent conduct, but whether before or after the promise of marriage did not appear, it was held to be error for the court to charge that the jury must either give "exemplary damages or nothing," implying thereby that if the defendant was not entirely discharged from

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**Art. 8. Procedure and Trial.**

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his promise by the plaintiff's conduct he could make no claim to mitigation of damage upon such grounds. *Palmer v. Andrews*, 7 Wend. 142.

Where the defense was infancy it was held to be error for the court to refuse a charge that if the jury believe the defendant was under age of twenty-one at the time of promise of marriage they must find a verdict for the defendant. *Leichtweiss v. Trieskow*, 21 Hun, 487.

It is not erroneous to charge that if the jury find that the defendant seduced the plaintiff under a promise of marriage it aggravates the damage. *Kniffen v. McConnell*, 30 N. Y. 285.

In *Campbell v. Arbuckle*, 21 St. Rep. 412, 4 N. Y. Supp. 39, affirmed in 123 N. Y. 662, it was held not to be error to charge that if the jury found for the plaintiff she was entitled to recover such damages as the jury might award; that they were permitted to exercise their discretion in regard to the amount of damage, provided only that their conduct was not marked by prejudice, passion, or corruption.

**SUBDIVISION 3.****Appeal.**

Where the defendant pleaded infancy, and the jury found him to be of age, and defendant waited until the time he claimed he became of age and then moved to set aside the judgment, the motion was denied. The remedy should have been to appeal from the judgment. *Genser v. Freeman*, 2 City Ct. 406.

**SUBDIVISION 4.****Execution.**

Judgment in an action for breach of promise to marry is not a debt recoverable against a defendant's real property under the Homestead Act. *Cook v. Newman*, 8 How. Pr. 523.

**SUBDIVISION 5.****Discharge in Bankruptcy.**

A judgment in an action to recover for breach of promise to marry is discharged by bankruptcy, even though the plaintiff pleaded and proved seduction in aggravation of the damage. *Disler v. McCauley*, 66 App. Div. 42, 73 N. Y. Supp. 270, 107 St. Rep. 270, reversing 35 Misc. Rep. 411. (See Amendment 1903.)

## Art. 9. Damages.

It was held in *Finnegan v. Howe*, 35 Misc. Rep. 773, 72 N. Y. Supp. 347, 106 St. Rep. 347, that a discharge in bankruptcy does release a judgment against a bankrupt for breach of promise where there was no accompanying seduction or proof of malice tending to show an attempted injury to the character, for in such case it is a mere contract debt of record, and "no willful and malicious injury to the person" within the meaning of the Bankruptcy Act of 1898, § 17, subd. 2.

The fact that a bankrupt went into bankruptcy in order to avoid a particular judgment for breach of promise to marry does not limit the legal effect of his discharge. *Finnegan v. Hall*, 35 Misc. Rep. 773, 72 N. Y. Supp. 347, 106 St. Rep. 347.

In *Matter of McCaulay*, 101 Fed. 223, it was held that a judgment for breach of promise to marry was discharged by bankruptcy, even though accompanied by seduction.

## ARTICLE IX.

## DAMAGES.

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## SUBDIVISION 1.

## Compensatory.

Speaking of the elements of damage the court in *Wolters v. Schultz*, 1 Misc. Rep. 196, 59 St. Rep. 910, 21 N. Y. Supp. 768, says, that the damages should include (a) all expenses justly incurred upon the faith of the violated contract and by reason thereof, and all pecuniary loss directly caused thereby; (b) a sum sufficient, in the discretion of the jury, calmly and judicially exercised, to vindicate plaintiff's character; (c) and in case the defendant is shown to have acted maliciously, unfeelingly, and with evil and dishonest intention, a further award must be made sufficient to be a punishment and a warning to others, and thus a safeguard to society.

"The action is intended as an indemnity for the temporal loss which the plaintiff has sustained, and that embraces the mortification to the feelings, the wounded pride, and all the disappoint-

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Art. 9. Damages.

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ments from the failure of marriage, as well in the losses it has occasioned as in the blow to the affections." *Chellis v. Chapman*, 125 N. Y. 214, 35 St. Rep. 171, affirming 26 St. Rep. 953.

The damages in an action for breach of promise are in the sound discretion of the jury under the circumstances of each particular case. *Southard v. Rexford*, 6 Cow. 254.

Where under a promise of future marriage the parties have cohabited as man and wife, and defendant made breach of the original promise, it was held that the woman could not recover for the breach, but might recover back money paid to the defendant in expectation of marriage. *McDonald v. McCann*, 4 City Hall Rec. 63.

Speaking of the rule of damages, the court, in *Johnson v. Jenkins*, 24 N. Y. 254, speaks as follows: "If the abandonment of the plaintiff by the defendant was wanton and ruthless, and so accomplished as to manifest an intent unnecessarily to wound her feelings, injure her reputation, and destroy her future prospects, all circumstances showing the defendant to have been influenced by bad motives; then the largest measure of damages, not only by way of compensation to the plaintiff, but, under the rule, by way of punishment to the defendant, were proper. If, on the contrary, the breach of promise was occasioned by a change of circumstances, which, without legally justifying it, took from the abandonment all its character of cruelty and wantonness, and the defendant, in withdrawing from his engagement, was tender of the feelings and reputation of the plaintiff, and so accomplished his purpose as to leave no stain upon her reputation, and do the least injury to her feelings and future prospects, it would be a case for compensatory damages merely. And so the just measure of damages may be varied by every shade and variety of circumstances between the two extremes, and hence every circumstance which can characterize the transaction, or throw light upon the acts and the motives of the actors is admissible in evidence."

Loss of health by the plaintiff cannot be said to be the direct natural and necessary consequence of the breach of contract to marry, and cannot be shown unless special damages are averred on that ground. *Bedell v. Powell*, 13 Barb. 183.

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Art. 9. Damages.

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## SUBDIVISION 2.

## Punitive Damages — Aggravation and Mitigation of.

It is solely the fact that punitive damages are allowed in an action for breach of contract to marry, which allows the action to be classed among torts. "Damages in these actions have never been limited to the simple rule governing actions upon simple contracts for the payment of money." *Thorn v. Knapp*, 42 N. Y. 483.

If the defendant alleges that the plaintiff has been guilty of fornication, but fails to show it upon the trial, the jury may consider this in aggravation of damages. *Southard v. Rexford*, 6 Cow. 254.

Where the defendant alleged the unchastity of the plaintiff in his answer, which allegation he failed to prove, the fact may be considered by the jury in aggravation of damages. *Thorn v. Knapp*, 42 N. Y. 474.

If the conduct of the defendant, in violating his promise, is characterized by a disregard of the plaintiff's feelings and reputation, if he has placed her or induced her to place herself in a false position, or to forego temporal advantages; if the breach of promise is unjustifiable; if the defendant spreads upon the records matters in defense of the action which are scandalous and tend to reflect discredit upon the plaintiff, or stain her reputation, then all of these circumstances may be considered by the jury, and may be availed of by them to enhance the damages. *Chellis v. Chapman*, 125 N. Y. 214, 35 St. Rep. 171, affirming 26 St. Rep. 953.

The fact that the defendant's promise was made with a view to seducing the plaintiff, and that by means of promises he did so seduce her, may be shown in aggravation of damage. *Wells v. Padgett*, 8 Barb. 323.

A verdict which amounts to only  $4\frac{1}{2}$  per cent. for one year upon the estate of the defendant cannot be deemed excessive, and shows that the jury was not influenced by a desire to inflict punitive damages. *Campbell v. Arbuckle*, 21 St. Rep. 412, 4 N. Y. Supp. 39, affirmed in 123 N. Y. 662.

The animus with which the contract is broken is material, and it is competent for the defendant to prove in mitigation of damage



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Art. 9 Damages.

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any facts showing his motive was not bad, and his conduct neither cruel nor malicious. *Thorn v. Knapp*, 42 N. Y. 474.

**SUBDIVISION 3.****Amount of Damages.**

A verdict of \$7,500 was held to be excessive in an action for breach of promise, coupled with seduction, where the plaintiff was receiving a salary of \$30 a week from her father. *Held*, that the recovery should be reduced to \$2,500. *Kolsch v. Jewell*, 21 App. Div. 581, 48 N. Y. Supp. 527.

While the jury is the final arbiter of damages, the appellate courts have the duty to review a verdict, and where the verdict has been illegally influenced a new trial should be ordered. *Wolters v. Schultz*, 1 Misc. Rep. 196, 21 N. Y. Supp. 768.

A verdict of \$1,500 is not excessive where it is shown that the defendant induced the plaintiff to give him charge of her money and he spent the same. *Finkelstein v. Barnett*, 16 Misc. Rep. 488, 38 N. Y. Supp. 961, 74 St. Rep. 551.

Where an action was brought by a widow, forty-six years of age, and there was no proof as to the defendant's circumstances, a verdict of \$2,500 was set aside as excessive. *Poser v. Kahrs*, 2 City Ct. 92.

A verdict of \$1,500 was held not to be excessive where the defendant asserted the bad character of the plaintiff. *Rich v. Mayer*, 26 St. Rep. 107, 7 N. Y. Supp. 70.

A verdict of \$8,000 was held not to be excessive where the defendant was a man of means and the plaintiff had given up the position of a school teacher at his request. *Chellis v. Chapman*, 26 St. Rep. 953, 7 N. Y. Supp. 78.

A verdict of \$5,000 was held not to be excessive where the wrong was aggravated by seduction. *Nearing v. Van Fleet*, 71 Hun, 137, 54 St. Rep. 308, 24 N. Y. Supp. 531, affirmed in 151 N. Y. 643.

## CHAPTER XII.

### ASSAULT AND BATTERY.

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#### ARTICLE I.

##### DEFINITIONS AND DISTINCTIONS.

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##### SUBDIVISION 1.

###### Assault.

An assault is an attempt or offer, accompanied by a degree of violence, to commit some bodily harm by any means calculated to produce the end, if carried into execution. Bacon's Abr., Assault.

An assault is defined \* \* \* to be an attempt with force or violence to do corporeal injury to another; and may consist of any act tending to such corporeal injury, accompanied with such circumstances as denote at the time an intent, coupled with a present ability, to use actual violence against a person. Cowen, J., in *Hays v. People*, 1 Hill, 352.

In the same case the court says: "There need not be even a direct attempt at violence; but any indirect preparation toward it under the circumstances named, such as drawing a sword or bayonet, or even laying hands upon his sword, will be sufficient."

Blackstone defines assault as "an attempt or offer to beat another, without touching him; as if one lifts up his cane, or his fist, in a threatening manner, at another; or strikes at him, but

## Art. 1. Definitions and Distinctions.

misses him; this is an assault, *insultus*, which Finch describes to be 'an unlawful setting upon one's person.' This also is an inchoate violence amounting considerably higher than bare threats; and, therefore, though no actual suffering is proved, yet the party may have redress by action *trespass vi et armis*; wherein he shall recover damages as a compensation for the injury. 3 Bl. Comm. 120.

Blackstone also speaks of injury by threats which results in inconvenience. He says: "A menace alone, without consequent inconvenience, makes not the injury; but, to complete the wrong, there must be both of them together. The remedy for this is in pecuniary damages, to be recovered by action of trespass *vi et armis*; this being an inchoate, though not an absolute, violence." 3 Bl. 120.

But Coleridge, in a note to this portion of the Commentaries, says that the proper action in a case of menace in connection with the injury was trespass on the case and not trespass *vi et armis*.

A modern and scientific definition is that of Stephen: "An assault is the attempt unlawfully to apply any, even the lightest actual force, to the person of another, directly or indirectly; the act of using gestures toward another, giving him any reasonable ground to believe that the person using the gestures meant to actually apply such forces as aforesaid; or the act of depriving another of his liberty; in either case without the consent of the person assaulted, or with his consent, if it is obtained by fraud." 11 Stephen's Digest of Criminal Law (Am. ed.), 181. It will be noted that this definition includes those assaults which are comprehended in false imprisonment, which in many cases also furnishes grounds for action of assault and battery.

In Moak's Underhill on Torts, 204, assault is defined as "an unsuccessful attempt to do harm to the person of another."

*Code.*—The term "personal injury," as used in the Code of Civil Procedure, includes assault and battery. § 3343, subd. 9.

## SUBDIVISION 2.

## Battery.

The result of a successful assault is a battery, and thus every battery includes an assault. See Co. Lit. 253.

"The least touching of another in anger is battery." *Cole v. Turner*, 6 Mod. 149.

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 Art. 1. Definitions and Distinctions.
 

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A battery consists in the unlawful and unjustifiable use of force and violence, however slight, upon the person of another. *Com. v. McKie*, 1 Gray (Mass.), 61.

A battery consists in the violent, angry, rude, or insolent striking the body or person either by the defendant or by some substance put in motion by him. 1 Hawk. P. C., chap. 62, § 2.

In civil actions, every imprisonment includes a battery and every battery an assault. *People v. Bransby*, 32 N. Y. 540, citing 2 Just. 589; Bull. N. P. 22; *People v. Hays*, 1 Hill, 351.

Blackstone thus speaks of battery: "It is the unlawful beating of another. The least touching of another's person willfully or in anger is a battery; for the law cannot draw the line between degrees of violence, and, therefore, totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it in even the slightest manner." 3 Bl. Comm. 120.

A battery is any unlawful touching the person of another by the aggressor himself, or any substance put in motion by him. 1 Saund. 29, b. n. 3.

A successful assault becomes a battery. \* \* \* The wrong consists not in the actual touching of the person so much as in the manner and spirit in which it is done, and the question of bodily pain and injury is important only as affecting the extent of the damages. Cooley's Elements of Torts, 47.

Thus, to push gently against a person in an endeavor to make one's way through a crowd is no battery, but a rude and insolent push may justify damages proportioned to the rudeness. Cooley's Elements of Torts, 47, citing *Cole v. Turner*, 7 Mod. 149.

The slightest touching of the person of another in a rude or angry manner is assault and battery. *Spence v. Duffy*, 1 C. H. Rec. 39.

Battery, as distinguished from assault, is where a person is actually struck or touched in a violent, rude, malicious manner. *Clayton v. Keeler*, 18 Misc. Rep. 488, 42 N. Y. Supp. 1051.

### SUBDIVISION 3.

#### Historical.

The action for assault and battery rests upon the ground that it was an injury to an absolute natural right, namely, the right to personal security. See 3 Bl. Comm. 119, 120.

## Art. 2. Remedies.

There are many specific injuries to the person clearly actionable, as to which it is difficult to determine whether the action is assault and battery, properly speaking, or an action founded upon the negligent, mischievous, or malicious act of the defendant. Under the common law, the difference in these cases was more clearly marked, for the action for assault and battery was the common-law action of *trespass vi et armis*; while the action for wrongs, unaccompanied by direct force, was the action of trespass upon the case. The difference is thus given by Blackstone: "And it is a settled distinction that, where an act is done which is in itself an immediate injury to another's person or property, there the remedy is usually by an action of *trespass vi et armis*; but where there is no act done, but only a culpable omission, or where the act is not immediately injurious, but only by consequence and collaterally, there no action of *trespass vi et armis* will lie, but an action on the special case, for the damages consequent on such omission or act." 3 Bl. 123.

It would seem that the distinction lies in the fact that in assault and battery the consequent injury to the person refers to the direct application of force, though it is not necessary that such force be applied with a special injury in view. See *Scott v. Shepard*, 2 W. Bl. 892; *Bull v. Colton*, 22 Barb. 94.

Every person has a right to live in society without being put in fear of personal harm, and he has an action for the invasion of this right, even though not otherwise injured. Cooley's Elements of Torts, 47, citing *Beach v. Hancock*, 27 N. H. 223.

## ARTICLE II.

## REMEDIES.

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## SUBDIVISION 1.

## Criminal Action — Does not Bar Civil Action.

Assault and battery like some other torts may furnish ground for both a criminal prosecution in which the people are plaintiff and a civil action for damages brought by the parties injured.

In the criminal action intent is, of course, an essential element,

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 Art. 2. Remedies.
 

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while in the civil action intent is not essential, though the presence or absence of intent is of great importance on the question of damages.

In order to authorize a criminal action for assault and battery there must also be the intent, express or implied, to injure another. *Rex v. Gill*, 1 Stra. 109.

In criminal actions intent coupled with present ability to use actual violence is necessary. *People v. Terrel*, 33 St. Rep. 368, 11 N. Y. Supp. 364.

A criminal conviction for assault cannot be upheld where no battery has been committed, and none attempted, intended, or threatened by the party accused. It is indispensable to the offense that violence to the person be either offered, menaced, or designed. *People v. Bransky*, 32 N. Y. 532.

Criminal assaults and the degrees and punishment therefor, and the definitions of force and violence which are not lawful, are governed by Penal Code, §§ 217-223.

The party injured may proceed by indictment and by action at the same time, and the court will not compel him to stay proceedings in either. 1 Bos. & P. 191.

Blackstone says that "for assault, battery, wounding, and mayhem an indictment may be brought as well as an action, and frequently both are accordingly prosecuted, the one at the suit of the crown for the crime against the public, the other at the suit of the party injured, to make him a reparation in damages." 3 Bl. 121.

A conviction for criminal assault and battery does not bar a civil action, and in spite of such conviction the plaintiff may recover exemplary damages; nor, it seems, can evidence of the criminal conviction be given to mitigate damages in the civil suit. *Cook v. Ellis*, 6 Hill, 466.

Nor will an acquittal in a criminal action for assault and battery bar a subsequent civil action for damages. *Rosenberg v. Salvatore*, 1 N. Y. Supp. 327.

### SUBDIVISION 2.

#### Jurisdiction.

Justices of the peace have no jurisdiction in action for assault and battery. Code Civ. Proc., § 2863.

Nor have the justices' courts of Albany or Troy. Code Civ. Proc., § 3223.

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Art. 2. Remedies.

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The City Court of New York has jurisdiction in an action in favor of or against a person, belonging to or on board of a vessel in the merchant service to recover damages for an assault, battery, or false imprisonment, committed on board the vessel, upon the high seas, or in a place without the United States. Code Civ. Proc., § 317, subd. 2.

The action for assault and battery, like other torts, is transitory, following the person; thus, the courts of this State have jurisdiction to hear an action for assault made by one alien upon another where it was committed in another country. The court will also have jurisdiction for assaults committed abroad when both or either of the parties are citizens of this country. *De Witt v. Buchanan*, 54 Barb. 31.

While a criminal action does not bar the civil action, yet it seems that there cannot be cross-actions between the same parties for assault and battery. The court says: "It is true that both parties may be guilty of a breach of peace and may be liable to punishment by indictment at the suit of the people whose laws they have both offended; but a civil action cannot surely be sustained by each of them against the other." *Elliott v. Brown*, 2 Wend. 500.

**SUBDIVISION 3.****Statute of Limitations.**

Assault and battery is an action which must be brought within two years. Code Civ. Proc., § 384.

In case the assault and battery results in the death of a party an action by the next of kin must be commenced within two years after the death of decedent. See Code Civ. Proc., § 1902. (See "Survival of Action," *post*.)

**SUBDIVISION 4.****Survival and Assignment.**

A claim for assault and battery is not assignable by virtue of section 1910, subdivision 1, of Code of Civil Procedure, the same being an action to recover damages for a personal injury under the definition of personal injuries, section 3343, subdivision 9, of Code of Civil Procedure.

At common law an injury to life itself, that is to say, murder, could not be the subject of civil action, the civil remedy being merged in the offense to the public. Therefore an action would not

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lie for battery of wife or servant, whereby death ensued. *Styles*, 347; 1 Lev. 249; *Yelv.* 89-90. This was so because of the common-law rule that an action for assault died with the party, and the wife or husband, parent or child of the party killed could not recover any pecuniary compensation. *Baker v. Bolton*, 1 Campb. 493. Such was the law until the enactment of the statute 9 & 10 Vict., chap. 93, providing that whenever death of a person shall be caused by the wrongful act, neglect, or default, as would, if death had not ensued, have entitled the party injured to be sued by the executor or administrator for the benefit of the husband or wife, parent or child of the person deceased. This act, known as Lord Campbell's Act, is the forerunner of the present section 1902 of the Code of Civil Procedure, which provides, "The executor or administrator of a decedent, who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued. Such an action must be commenced within two years after the decedent's death."

The above section of the Code has been held to authorize an action by the next of kin for assault and battery in a case which resulted in the death of the party injured. *Kain v. Larkin*, 56 Hun, 80, 9 N. Y. Supp. 89.

It should be noted that the liability for an assault causing death rests solely upon the above statute and that assault and battery is expressly excluded from the injuries to the person which survive by virtue of the Revised Statutes following:

2 Rev. Stat., § 1, provides that wrongs done to property, rights, or interests of another, for which an action might be maintained against the wrongdoer, such action might be brought by the person injured, or after his death by his executor or administrator against such wrongdoer; or after his death against his executors or administrators in the same manner and with like effect in all respects as actions founded upon contracts. But section 2 provides that the preceding section shall not extend to actions for slander, for libel, or actions for assault and battery or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator.



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 Art. 3. Elements of the Wrong.
 

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**ARTICLE III.****ELEMENTS OF THE WRONG.**

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**SUBDIVISION 1.****As to Intent.**

While an intent to do some wrong is necessary to a criminal conviction for assault and battery (*People v. Bransby*, 32 N. Y. 525), the element of intent seems to be of much less importance in the civil action.

In a civil action for assault and battery, there need not be express intention to do the injury if the assault is committed in pursuance of an unlawful act or was the result of negligence. This is well illustrated by the famous "Squib Case" (*Scott v. Shepard*, 2 W. Bl. 892), in which the defendant was held liable for assault in the absence of a criminal intent. In that case a lighted squib was thrown by the defendant into a market-house while a fair was being held. The squib fell upon the stand of one who, to prevent injury to himself, threw it across the house, where it fell upon the stand of another, who in the same way threw it again, striking the plaintiff and putting his eye out. The court said: "The throwing of the squib by the defendant was an unlawful act at common law, as the squib had a natural power and tendency to do mischief indiscriminately. \* \* \* No man contracts guilt in defending himself; the second and third men were not guilty of any trespass, but all the injury was done by the first act of the defendant. \* \* \* For I conceive all the facts of throwing the squib must be considered as one single act, namely, the act of the defendant, the same as if it had been a cracker made of gunpowder which had bounded and rebounded again and again before it had struck out the plaintiff's eye."

It is not necessary that one intend the particular injury which follows an illegal or mischievous act in order that he may be liable

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for the consequences. Thus, where the defendant having a quarrel with a boy in the street of a city, took up a pickaxe and followed him into the plaintiff's store, where he fled in endeavoring to keep out of defendant's road, and the boy ran against and knocked out the faucet of a cask of wine, by means of which a quantity of the wine ran out and was wasted, the defendant was held liable for the damages. *Vandenburg v. Truax*, 4 Den. 464, citing *Scott v. Shepard*, 2 W. Bl. 892; *Guille v. Swan*, 19 Johns. 381.

(Note that though this action was for trespass and for an injury to property, yet the decision is largely founded upon *Scott v. Shepard*, which was an action for assault.)

Thus, a person while intending to kill an enemy attacks his friend in the dark by mistake and wounds him; he is, nevertheless, guilty of assault with intent to murder. *McGee v. State*, 62 Miss. 772, 52 Am. Rep. 209.

It is not necessary that the defendant intend to do the particular assault complained of. Thus, where the defendant intended to strike at one person, but hit another, he is liable to such person injured for assault and battery. *Corning v. Corning*, 6 N. Y. 103.

There is a presumption of innocence on the part of a defendant in a civil action in case where a judgment against him would show him to have been guilty of a crime, and the defendant is entitled to such a charge. *Grant v. Riley*, 15 App. Div. 190, 44 N. Y. Supp. 238.

Although a private person may arrest a felon, yet where one arrested a female on the charge of giving counterfeit money, and thereupon took her into his house and detained her for three-quarters of an hour, demanding payment as a condition of release, it was held to be an assault and battery and false imprisonment. *People v. McArdle*, 1 Wheel. Cr. Cas. 101.

It was held in an action for assault and battery brought in a justice court, which was without jurisdiction, that where the defendant made an assault upon the horse of the plaintiff while the plaintiff was in the wagon attached thereto, as a result of which he was injured as well as the horse, that the plaintiff could have sustained an action in the Supreme Court for assault upon his person, and also recover damages for the injury to the horse. *Bull v. Coulton*, 22 Barb. 95, citing *De Mareville v. Oliver*, 1 Penn. (N. J.) 380; 1 Dallas, 114; Barb. Cr. Tr. 212; *People v. Lee*, 1 Wheel. Cr. Cas. 364, 4 Den. 453. Whart. Am. Cr. Law, 462.

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Where a passenger did not procure a ticket at the office owing to the absence of the ticket agent, and, therefore, refused to pay the additional fare of five cents, it was held that, owing to the absence of the ticket agent, the defendant was not entitled to demand the extra five cents, and that if the conductor, after being informed of the facts, ejected the plaintiff, the latter could maintain an action for assault and battery. His remedy is not limited to an action for unlawful ejection. Moreover, the passenger is entitled to resist such ejection to the best of his ability. *Monnier v. N. Y. C. & H. R. R. Co.*, 70 App. Div. 405, 75 N. Y. Supp. 521, reversed 175 N. Y. 281.

It is assault and battery to strike a horse on which another is riding, thereby causing him to be thrown down. *Dodell v. Burford*, 1 Mod. 24.

In a criminal case it was held that to vaccinate a person against his will and without legal authority is assault. *Matter of Walters*, 84 Hun, 457, 65 St. Rep. 479, 32 N. Y. Supp. 322.

From the cases it would seem that there need be no intent, either particular or not, to render the defendant liable when a battery is *actually committed*; yet in cases where there is no battery the presence of an intent to commit a battery, or acts which would lead the plaintiff to a reasonable fear of battery is alone sufficient to a liability. Thus: In a criminal case it was held to be a battery to attempt to run against a wagon of another person on a highway, even though there was no actual collision. *People v. Lee*, 1 Wheel. Cr. Cas. 364.

The menace of violence with a dangerous weapon by a person within striking distance of the party menaced is assault, although the party menaced is not actually struck, and damages may be recovered for such assault. *Liebstadter v. Federgreen*, 80 Hun, 245, 61 St. Rep. 621, 29 N. Y. Supp. 1039.

It is assault to pursue a man with a dangerous weapon and come so near him that he may reasonably apprehend danger. *Fairme's Case*, 5 City H. Rec. 95.

The intent must be concurrent with the act and must not be negated by other acts. Thus, where one laid his hand upon his sword, and said that if it was not assize time I would not take such language. Held not to be an assault. *Tuberville v. Savage*, 1 Mod. 3.

The same principle was applied in *Com. v. Eyre*, 1 Serg. & R. (Pa.) 347, where the defendant, within striking distance, raised

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his hand, saying: "If it was not for your gray hairs I would tear your heart out." *Held*, that it was not an assault because of the words negating the intention to strike.

In an action for assault under such circumstances as would constitute the crime of rape it was held that in order to maintain the action it would be necessary to satisfy the jury that if the defendant had criminal connection with the plaintiff, it was accompanied with intent on his part to effect his purpose in defiance of all resistance, and without her consent, and that this was a question for the jury. *Dean v. Raplee*, 145 N. Y. 319, 64 St. Rep. 677, affirming 75 Hun. 389, 57 St. Rep. 690, 27 N. Y. Supp. 438.

In a civil action for assault and battery, while the assault must be unwarranted, it need not, in order to render defendant liable, have been committed in anger. *Johnson v. McConnell*, 15 Hun, 295, citing *Hilliard on Torts*, 189, 193, note; *Bullock v. Babcock*, 3 Wend. 391; *Hilliard on Torts*, 189, 193.

Compare the facts in *Isaacs v. Flahive*, 14 Misc. Rep. 249, 35 N. Y. Supp. 716, 70 St. Rep. 450.

**SUBDIVISION 2.****Overt Act.**

But of course mere intent is no assault, it must be evinced by some overt act.

An overt act and not a mere intention is necessary to a battery. See *People v. Powers*, 1 Wheel. Cr. Cas. 405. Though in order to constitute assault there need not be even a direct attempt at violence, but indirect preparation toward it is sufficient. *Hays v. People*, 1 Hill, 353.

In a criminal case it was held that to seize the reins of a team which a person was driving, stopping them, and directing another person to turn the team in another direction, which was done, is an assault upon the person driving. *People v. Moore*, 50 Hun, 356, 20 St. Rep. 1, 3 N. Y. Supp. 159.

**SUBDIVISION 3.****Ability.**

And this overt act must be accompanied with an ability, real or apparent, to perform it.

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In the definition of assault as laid down in *Hays v. People*, 1 Hill, 352, it was said that there must be an intent coupled with present ability to do actual violence against the person.

To constitute assault with a dangerous weapon, as with a gun or pistol, it is necessary that the weapon should be presented within a distance at which it may do execution. 1 Wait's Actions and Defenses, 332.

But it is sufficient to an assault if the ability to do violence is apparent, even though it is not real. The essence of the wrong is putting a person in present fear of violence. Pollock on Torts, 185.

The ability to commit the assault would not seem to be a necessary element if there is an apparent ability to commit it, as where one menaces another with a pistol he is nevertheless guilty of assault, even though the same be not loaded, unless perhaps it might be shown that the plaintiff knew of this fact. See *People v. Morehouse*, 6 N. Y. Supp. 764, citing *Reg. v. St. George*, 9 Car. & P. 483; *State v. Cherry*, 11 Ired. (N. C.) 475; *Com. v. White*, 110 Mass. 407; *Crow v. State*, 41 Tex. 468; *State v. Shepard*, 10 Iowa, 126; *Anonymous*, 1 Vent. 256; *Genner v. Sparks*, 6 Mod. 173, 174; *Fairme's Case*, 5 City H. Rec. 195; *People v. Lee*, 1 Wheel. Cr. Cas. 364; *People v. Bransby*, 32 N. Y. 525.

In *Com. v. White*, 110 Mass. 407, the court said: "If A. menacingly points at B. a gun, which B. has reasonable cause to believe loaded, and B. is put in fear of immediate bodily injury therefrom, and the circumstances would ordinarily induce such fear in a reasonable man, A. is guilty of assault, although he (A.) knows that the gun is not loaded."

#### SUBDIVISION 4.

##### Force.

Assault, it would seem, must always be accompanied by some physical force on the part of the defendant. Thus mere threats unaccompanied by fear or attempt to inflict bodily harm do not constitute an assault. *Kzyes v. Devlin*, 3 E. D. Smith, 518.

Force is defined as "Power dynamically considered, that is, in motion or in action; constraining power; compulsion; strength directed to an end. Unlawful violence which may be implied as in every trespass." Black's Law Dict.

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It is also defined as "Strength or power exercised without law upon persons or things." Burr. Law Dict. But the extent of the force is not an essential. In *Watson v. Oswego Street Ry. Co.*, 7 Misc. Rep. 562, 58 St. Rep. 356, 28 N. Y. Supp. 84, where the plaintiff, weak from the effects of an anæsthetic, was gently put off the car by a conductor on the order of the president of the road, who believed the plaintiff to be drunk, and where the conductor in complying with the order placed his hand upon the plaintiff's arm, he being helpless at the time, it was held "that if the physical contact of the conductor was in the slightest degree a constraining power in causing plaintiff to act and leave the car, it constituted force in the legal acceptance of the term; and that the question whether it had that effect should have been left to the jury."

It would seem that although there may not be any battery, yet where one compels another to do an act against his will, it will constitute assault. Thus, A., within striking distance of B., threatened him with a weapon, declaring at the same time that if B. performed a certain act A. would not strike, and B. does perform the act in consequence of which he is not struck, that this nevertheless is an assault. *State v. Morgan*, 3 Ired. (N. C.) 186; *U. S. v. Myers*, 1 Cranch C. C. 310.

And where the defendant ordered the plaintiff to leave his shop, and, on his refusal, sent for some men, who gathered around the plaintiff, and threatened to break his neck if he did not go out, it was held to be an assault. *Read v. Coker*, 24 Eng. L. & Eq. 213, 13 C. B. 850.

A battery need not necessarily be a blow upon the person, but anything which attacks the inviolability of a person, as a blow upon the skirt of one's coat then, upon his person. 1 Wait's Actions and Defenses, 335, citing *Republica v. De Longchamps*, 1 Dall. 114; *U. S. v. Ortega*, 4 Wash. 534.

Spitting in a man's face is a battery, and is even more offensive than a blow. *Reg. v. Cotesworth*, 6 Mod. 172.

Throwing vitriol upon another is assault and battery for which a criminal prosecution will lie. *People v. Bracco*, 69 Hun, 206, 23 N. Y. Supp. 505.

To give another a harmful drug with intent to inflict injury would seem to be an assault and battery. *People v. Blake*, 1 Wheel. Cr. Cas. 490.

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"Deception may sometimes be equivalent to assault or an ingredient in assault: as when an explosive is put in one's hand without knowledge on his part of its nature, or a poisonous drug is given him concealed in his food. *Cooley's Elements of Torts*, 48, citing *Com. v. Stratton*, 114 Mass. 303, 19 Am. Rep. 350.

One who is present and instigates and encourages those who are actually using physical force is liable for assault and battery. *Newman v. Marshall*, 20 J. & S. 202.

An arrest and detention which amounts to false imprisonment is also an assault and battery. *Blythe v. Tompkins*, 2 Abb. Pr. 486; *Williams v. Garrett*, 12 How. Pr. 456.

Arresting a man on bail after the suit has been settled has been held to be assault. *Malcom's Case*, 1 City H. Rec. 60.

Where the defendant's servant took a cloak from a prospective purchaser on the ground that she was a spy from a rival concern, it was held that it amounted to an assault as an unlawful setting upon another's person. *Geraty v. Stern*, 30 Hun, 427.

Where there is no question but that some force was used by the defendant in an effort to remove the plaintiff from his premises, a cause of action is made out, and the only inquiry remaining for the jury is the amount of the recovery which should be given to the plaintiff. *O'Donnell v. McIntyre*, 37 Hun, 627.

Of course the application of lawful force, which is not excessive, is not an assault. *People v. Gulick*, Hill & Den. 229; *Hager v. Danforth*, 20 Barb. 16; *People v. Wolven*, 7 N. Y. Leg. Obs. 89; *Burns v. Erben*, 1 Robt. 555, affirmed 40 N. Y. 463.

But to justify a special deputy in making an arrest he must show his warrant; otherwise a person may resist. *Frost v. Thomas*, 24 Wend. 418.

## SUBDIVISION 5.

## Aggravated Assault.

Certain crimes are aggravated assaults, thus:

Blackstone says that wounding, which consists in giving another some dangerous hurt, is only an aggravated species of battery. And that mayhem is battery attended by this aggravated circumstance, that thereby the party injured is forever disabled from making so good a defense against future external injuries as he otherwise might have done. 3 Bl. 121.

Rape, as well as being a crime, is also assault and battery, for which a civil action for damages will lie at the suit of the party

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injured. See *Young v. Johnson*, 123 N. Y. 226, 33 St. Rep. 486, affirming 46 Hun, 164, 11 St. Rep. 590. See this case also for what may and may not be proven in such an action.

In the *crime* of mayhem, properly speaking, there must be an intent to maim and not merely an intent to do injury. Thus, it seems that if one strike another upon the head so as to crush the skull, it is not mayhem unless the intent of such blow was to maim the party injured. *Foster v. People*, 50 N. Y. 604. See this action for decisions on mayhem in early law. The same case also holds that since the statute the crime of mayhem only includes those injuries therein enumerated. But such acts are none the less assault and battery.

In civil actions for assault and battery indecent liberties taken by the defendant with the person of the plaintiff are subjects for consideration by the jury, and may call for punitive damages. The suffering of mind by reason of the shock to the moral sensibilities of plaintiff may be considered. However, the plaintiff's own acts thereafter, which are not a part of the *res gestæ*, are not admissible to prove such mental suffering. In such an action the plaintiff's character for chastity may be in issue, in which case it is competent to disprove her chastity by proving specific acts of lewdness and immorality. It is error to rule that character for chastity cannot be attacked by proof of general reputation. *Ford v. Jones*, 62 Barb. 484.

There is a difference between rape and indecent liberties. See *People v. Kirwan*, 22 N. Y. Supp. 160. Compare *Prince v. Ridge*, 32 Misc. Rep. 666, 66 N. Y. Supp. 454.

As to the effect of consent by the plaintiff in indecent assaults, see *People v. Special Sessions*, 18 Hun, 330; *People v. Bransby*, 32 N. Y. 525; *Hays v. People*, 1 Hill, 351; *People v. Quin*, 50 Barb. 128; *People v. Kirwan*, 22 N. Y. Supp. 160, also title "Defenses — Consent," *post*.

SUBDIVISION 6.

Acts Which are not Assaults.

Under this heading are treated those acts which are not assaults and batteries *from their very nature*. Of course if a wrong is to be strictly measured by the question of liability, there will be found to be many acts in themselves assaults, which, under the particular circumstances do not impose a liability. These will be found under the heading "Defenses."



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Abusive words alone cannot constitute an assault, and indeed may sometimes so explain the aggressor's intent as to prevent an act *prima facie* an assault from amounting to such an injury. *Chitty*, note to 3 Bl. Comm. 120.

Mere threats alone do not constitute an assault, and words accompanying a threatening gesture may deprive the gesture of the character of an assault, as where the defendant raised his whip and shook it at the plaintiff within striking distance of him and made use of the words: "Were you not an old man I would knock you down." The presenting or drawing of a gun, without attempting to use it or intent to use it unless first assailed, is not an assault. *Governor v. Powell*, 9 Ala. 83.

Shaking a stick at one in sport is not actionable. *Christopherson v. Bare*, 11 Q. B. 477.

Where during an altercation the defendant pointed a revolver at the plaintiff and said: "If you come near me I will shoot you," it was held that this did not constitute an assault. *People v. Johnston*, 9 Week. Dig. 384.

To merely point a cane at one on the street derisively and as an insult, without any intent to strike, is not assault. *Goodwin's Case*, 6 City H. Rec. 9.

Mere threats of assault unaccompanied with an attempt to inflict bodily harm do not constitute assault. *Keyes v. Devlin*, 3 E. D. Smith, 518.

A mere menace unaccompanied by any attempt to strike is not an assault. But a threat of bodily harm accompanied by an up-lifted fist or hand, with an intention to strike and sufficiently near to execute such design, constitutes assault. *Clayton v. Keeler*, 18 Misc. Rep. 488, 42 N. Y. Supp. 1051.

Mere words cannot amount to an assault. Thus where the defendant took hold of plaintiff's arm, she thinking he was to continue a conversation, and he making an indecent proposal, it does not constitute assault and battery. There was no physical menace against the body of plaintiff. *Prince v. Ridge*, 32 Misc. Rep. 666, 66 N. Y. Supp. 454.

A mere unintentional pushing against another in the street gives rise to no action. 4 Mod. 405.

To touch one in a friendly manner to call his attention to something is not an assault and battery. *Coward v. Baddley*, 4 H. & N. 378.

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It has been held that mere passive obstruction of the ingress of another, even though by design, is not assault. *Innes v. Wylie*, 1 Car. & K. 257.

The general principle seems to be that any mere omission will not constitute an assault. 1 Wait's Actions and Defenses, 334, citing *Smith's Case*, 2 Car. & P. 449.

The mere touching or placing of hands upon a person of another for the purpose of getting his attention is not a battery; the intent to do injury must occur with the use of unlawful violence. The slightest degree of force, however, constitutes violence. *Clayton v. Keeler*, 18 Misc. Rep. 488, 42 N. Y. Supp. 1051.

The case of *Laidlaw v. Sage*, 158 N. Y. 73, in which it was claimed by the plaintiff that the defendant being threatened by a third person with injury or death by dynamite, interposed the person of the plaintiff between such third person and himself, was largely in the nature of an action for assault, and more particularly those classes of assault in which the defense may be made upon the ground that the act was an involuntary act. The reader is referred to the case itself for a thorough discussion of the principal facts and the decision founded upon them. Among other things it was held that where one is under the influence of a present danger the law presumes that an act or omission done or neglected under such influence was done or neglected involuntarily, citing *Moak's Underhill on Torts*, 14; *Scott v. Shepard*, 2 W. Bl. 894; *Vandenburgh v. Truax*, 4 Den. 464.

The case also holds that the principle of proximate cause was not applicable under the state of facts, and that the act of one person cannot be said to be the proximate cause of the injury when the act of another person has interposed and directly inflicted it. That the cause of injury cannot be attributed to a cause unless without its operation it would not have happened. Also, that the bare possibility that the injury was caused by the act of the defendant is not sufficient if it might have been occasioned by one of two causes, for one of which the defendant was not responsible. Also, that in order to justify the submission of an issue to the jury the claim of the plaintiff upon which the liability of the defendant is to rest must be shown by sufficient proof, and that mere conjecture, surmise, speculation, bare possibility, or mere scintilla of evidence is not sufficient.

It would seem as if the defense of involuntary act in assault and

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battery would bear great analogy to the doctrine of involuntary act as established in cases for negligence.

Upon the subject of involuntary act, see also *Vandenburgh v. Truax*, 4 Den. 464, *supra*, in which it was held that one is liable for the consequences of his act, although he did not intend to do the particular act which followed. But it should be noted that the act in question was held to be illegal and mischievous, which was likely to prove injurious to others.

As a general rule it may be stated that arresting a person, although done by a private citizen and without process, is not an assault if the person arrested has committed a felony. *People v. Adler*, 3 Park. Cr. 249; *People v. Wolven*, 7 N. Y. Leg. Obs. 89; *Gyre v. Culver*, 47 Barb. 592.

## ARTICLE IV.

## DEFENSES.

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## SUBDIVISION 1.

## Self-defense.

Wait says that an assault is sufficient to deserve a blow, unless the battery be excessive. 1 Wait's Actions and Defenses, 342, citing *Hazell v. Clark*, 3 Harr. (Del.) 22; *Dele v. Word*, 7 Moore, 33.

The right of self-defense and its limitations is discussed in *Elliot v. Brown*, 2 Wend. 497, where the early cases are cited. The court said: "Although Elliot might have committed the first assault, yet if Brown used more violence than was necessary to his own defense, he became a trespasser and was liable to pay damages to the plaintiff." The court cites the statement of Holt, Ch. J., in *Cockroft v. Smith*, Salk. 642, where he said: "That for every assault, he did not think it reasonable a man should be

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banged with a cudgel." The court also discussed the case of *State v. Wood*, 1 Bay, 351, wherein the court said that "it is a justification to the defendant that the prosecutor or plaintiff gives the first blow; but the resistance ought to be in proportion to the injury offered. Where a man disarms the aggressor, or puts it out of his power to do further injury, he ought to desist from further violence; and if he commits any further outrage he becomes the aggressor." See also *People v. Murray*, 54 Hun, 406.

In *Scribner v. Beach*, 4 Den. 450, it was said that self-defense is a primary law of nature, and it is held to excuse breach of the peace and even homicide itself. But the court says: "Care must be taken that the resistance does not exceed the bounds of mere defense, prevention, or recovery, so as to become vindictive, for then the defendant would himself become the aggressor. The force used must not exceed the necessities of the case."

The rule allowing force to be used in self-defense goes to the extent of holding a person committing an assault under such circumstances responsible only for the force used by him in excess of that required for his protection. And the party acting in his self-defense has a right to prove his belief as to his danger at the time he was assaulted by plaintiff in mitigation of damages. *Elliot v. Brown*, 2 Wend. 497; *Hogan v. Ryan*, 5 St. Rep. 110.

In establishing the defense of self-defense it is sufficient for the defendant to show a reasonable ground for apprehending a design to take his life, or to do him some great bodily harm, and also a reasonable ground to believe the danger imminent that such a design would be accomplished, even if it might afterward turn out that such appearances were false, and that there was not, in fact, any design or any danger that it would be accomplished. One in imminent peril is not required to seek the protection of the law, though he may do so; yet the omission to do so does not in any way deprive him of the right to defend himself in the same manner and to the same extent and by the same means as if he had sought the protecting arm of the law. The question is not whether the defendant had sought the protection of the law, but whether he was in imminent peril and was justified in believing himself to be so. *Evers v. People*, 3 Hun, 716, affirmed in 63 N. Y. 625.

The question of self-defense is a matter for the jury on all the facts. See *Bensky v. Banks*, 30 St. Rep. 362, 8 N. Y. Supp. 935.

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**SUBDIVISION 2.****Defense of Another.**

The defense of one's kin, like the defense of one's person, will, if not excessive, justify an assault and battery. Thus Blackstone, speaking of the redress of private injuries by the mere act of the party injured, says: Of the first sort, or that which arises from the sole act of the injured party is, (1) The defense of one's self, or the mutual and reciprocal defense of such as stand in the relation of husband and wife, parent and child, master and servant. In these cases if the party himself, or any of these his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of the peace which happens is chargeable upon him only who began the affray. For the law in this case respects the passions of the human mind. 3 Bl. Comm. 3. See Bac. Abr., Master and Servant, P.

1 Lord Hale (p. 484) says: "That the law had been for a master killing in the necessary defense of his servant, the husband in defense of his wife, the wife of the husband, the child of the parent, or the parent of the child, for the act of the assistant shall have the same construction in such cases as the act of the party assisted should have had if it had been done by himself; for they are in a mutual relation to one another."

The defense of a servant will be excused or justified by the same means used to justify or excuse the defense of one's self. *Pond v. People*, 4 Cooley (Mich.), 205.

Likewise a servant may justify a battery in the necessary defense of his master. 2 Kent Comm. 261. Chancellor Kent says:

It is a question whether the master may not in like manner justify a battery in the defense of his servant. \* \* \* It is, however, hesitatingly admitted by Hawkins, and explicitly by other authorities, that he may; and the weight of argument is on that side. 2 Kent Comm. 261.

See also Hawk. P. C., b. 1, c. 60, §§ 23, 24; Reeves' Dom. Rel. 378.

By the Civil Code of Louisiana, art. 169, it is expressly declared that a master may justify an assault in defense of his servant, as well as the servant in defense of his master.

See also on this subject the opinion in *Scribner v. Beach*, 4 Den. 451.

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A servant or agent who is ordered to do an illegal act, such as an assault, is not bound to obey the order, and so cannot excuse himself under such order. *Brown v. Howard*, 14 Johns. 122.

But when a person does not stand in any of these domestic relations he cannot interfere on behalf of the party injured, but merely as an indifferent person to preserve the peace. 2 Stra. 954.

See title "Justification — Preservation of the Peace," *post*.

By section 205 of the Penal Code, homicide is justified when committed in the lawful defense of the slayer, or of his or her husband, wife, child, parent, brother, sister, master or servant, or of any person in his presence or company, where there is a reasonable ground to apprehend a design of the persons slain to commit a felony or to do some great personal injury to the slayer, or to any such person, and there is imminent danger of such design being accomplished, etc.

**SUBDIVISION 3.****Defense of Real Property.**

In *Scribner v. Beach*, 4 Den. 450, it was stated as a general proposition that a man "may justify an assault and battery in defense of his lands or goods, or the goods of another delivered to him to be kept. Hawk. P. C., b. 1, chap. 60, § 23; *Seeman v. Cuppledick*, Owen, 150. But in these cases unless the trespass is accompanied with violence the owner of the lands or goods will not be justified in assaulting a trespasser in the first instance, but must request him to depart or desist; if he continues he should gently lay his hands upon him for the purpose of removing him, and if he resists with force then force sufficient to expel him may be used in return by the owner. *Weaver v. Bush*, 8 T. R. 78, Buller's N. P. 19, 1 East P. C. 406. It is otherwise if the trespasser enter the close with force. In that case the owner may, without previous request to depart or desist, use violence in return in the first instance proportionate to the force of the trespasser for the purpose only of subduing his violence."

If one enters the house of another and makes an unlawful assault, such a person may use force to expel him from the house, and resistance to such attempt is not justified. *O'Connell v. Samuel*, 81 Hun, 361, 30 N. Y. Supp. 889, 62 St. Rep. 143.

In order to justify an assault in ejecting a trespasser who has entered peaceably, it should be shown that the trespasser was re-

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quested to depart and refused to do so. *People v. Van Vechten*, 2 N. Y. Cr. 292.

In *Filkins v. People*, 69 N. Y. 105, it is held as a general principle that if one comes forcibly upon the premises of another without right, the latter can oppose with force at once and without previous request to desist, as there is no time to make the request. Citing *Greene v. Goddard*, 2 Salk. 641; *Tullay v. Reed*, 1 C. & P. 296; *Weaver v. Bush*, 8 T. R. 78.

The owner of land bounded by tide water, who is grantee of the adjoining land below high-water mark, may exclude persons from entering thereon, and if he uses no more force than actually necessary he cannot be held in damages for assault. *Nolan v. Rockaway Park Imp. Co.*, 76 Hun, 458, 59 St. Rep. 175, 28 N. Y. Supp. 102; also 85 Hun, 617, 66 St. Rep. 416.

It has been held that if after the surrender of the lease of a church the pastor of the former lessee enters and occupies the pulpit, and insists upon preaching, the lessor is justified in removing him by force from the pulpit and from the church, using only such force as is necessary, if after notice he refuses to leave. *Conway v. Carpenter*, 80 Hun, 429, 62 St. Rep. 33, 37 N. Y. Supp. 315.

But in the same case on a former appeal in 73 Hun, 540, 56 St. Rep. 429, 26 N. Y. Supp. 255, it was held that where the determination of the lease was uncertain, its determination is not a justification for the forcible removal of the pastor, who had no notice of such determination.

In assault and battery the defendant may give evidence that he committed the same in defense of real property, and that he owned the premises upon which the same was committed, and if such assault was made in resisting persons from entering upon his premises, an open highway, the defendant may prove that such highway was laid without his consent through his roadway four years ago. (Criminal case.) *Harrington v. People*, 6 Barb. 607.

One is justified in using force to prevent another from entering his premises to take away a chattel, although the chattel is really owned by the trespasser. In such cases if the owner cannot regain possession peaceably he must resort to his legal remedy. *Newkirk v. Sabler*, 9 Barb. 652.

A landlord who is put in possession of his premises by warrant under summary proceedings is justified in using so much

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force as is necessary to defend himself and maintain possession against the defendant. *Sage v. Harpending*, 49 Barb. 166.

In an action for false imprisonment it was held to be a complete justification for the arrest of the plaintiff where the defendant peaceably entered the defendant's premises to make an arrest for violation of the Excise Law, and was there assaulted. *Parke v. Gilligan*, 14 Misc. Rep. 121, 35 N. Y. Supp. 477.

Whether a person defending his lands and goods uses greater force than is necessary or is proportionate to the force of the trespasser, is a matter for the jury under proper instructions from the court. *Filkins v. People*, 69 N. Y. 106, 1 Russell on Criminal Law, 609.

Where a tenant, dispossessed in summary proceedings, brings an action against the landlord for assault and battery committed by the landlord in defending his possession, it was held that the only question for the jury is as to whether the defendant landlord used excessive force. *Sage v. Harpending*, 49 Barb. 166.

But the mere right to the possession of real property, however perfect, will never justify the use of violence in enforcing it. *Mickles Case*, 1 City H. Rec. 96; *Mickles v. Edwards*, 1 City H. Rec. 119.

Though the actual possession of real property will justify the possessor in using violence in order to defend the same, yet a mere right to possession will not justify one in committing assault and battery upon another for the purpose of reducing his right to actual possession. And when both parties claim to have been in actual possession at the time, the question is for the jury. *Parsons v. Brown*, 15 Barb. 590.

It is a rule that the mere right to possession will not justify the use of force in taking possession; so held where one by assault and battery attempted to prevent the use of a right of way owned by another which was claimed to be forfeited. *McMillan v. Cronin*, 75 N. Y. 474, dismissing appeal from 13 Hun, 68.

As to the retaking of real property by mere act of the party, see 3 Bl. Comm. 5.

In *Bliss v. Johnson*, 73 N. Y. 533, it was said: "It is an elementary principle that one may justify assault and battery in self-defense or in defense of his possession of real or personal property. But the general rule is that a right of property merely, not joined with the possession, will not justify the owner in com-



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mitting an assault and battery upon the person in possession, although the possession is wrongfully withheld. This rule is founded upon considerations of public policy, to prevent parties from disturbing the public peace by attempts to right themselves by force instead of resorting to the remedy by action." Citing *Pollen v. Brewer*, 7 C. B. (N. S.) 371; *Parsons v. Brown*, 15 Barb. 590; *Sampson v. Henry*, 11 Pick. 387.

Although one has a legal right to the possession of real property he is not justified in entering and forcibly expelling another who is in actual possession, and he is liable for assault and battery in so doing. *Bristor v. Burr*, 120 N. Y. 431, citing *Parsons v. Brown*, 15 Barb. 590; *Bliss v. Johnson*, 73 N. Y. 529; *McMillan v. Cronin*, 75 N. Y. 474.

The same principle has been held where such right to possession is merely founded upon a tax title. *O'Donnell v. McIntyre*, 118 N. Y. 156, 28 St. Rep. 619, affirming 37 Hun, 623. See also 1 St. Rep. 68.

In regard to the limitation put upon regaining the possession by one having the right, it has been laid down that one having the right to possession, if he can enter peaceably and without force, from that time is in actual possession, and the possession of one having no right thereto is ended. In respect to possession and the right to regain it by force, a mere temporary absence of one having such right will not give possession to a stranger who enters without right during the absence of such person, and that the owner upon returning is justified in removing the intruder by force. *Bliss v. Johnson*, 73 N. Y. 534.

If a landlord mistakes his legal rights and forcibly removes another from his premises he becomes a trespasser and is liable for such damage as is sustained by reason of the assault. *Morgan v. Powers*, 83 Hun, 298, 31 N. Y. Supp. 954, 64 St. Rep. 749.

The defense of a right or claim to possession cannot be maintained by one who has wrongfully expelled another by force in a case where the other endeavored to regain possession. *Newman v. Marshall*, 20 J. & S. 202.

But even a trespasser, as one attempting to levy under void execution, cannot be wantonly assaulted, and may protect himself by force from unreasonable or wanton violence committed, or sought to be committed, by the party trespassed upon. This is owing to the fact that the latter is not justified in using this description of violence under the circumstances. He can lawfully use no more

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than is proper or necessary to prevent trespassing upon his right. *People v. Gulick*, Hill & Den. Supp. 230.

**SUBDIVISION 4.****Defense of Personal Property.**

In *Filkins v. People*, 69 N. Y. 106, it is said: "It is not disputed that a man may justify an assault and battery in defense of his lands or goods, or of the goods of another delivered to him to keep."

If one is attempting to commit violence, such as murder or rape, upon the person, or upon the property, such as arson or burglary, not only the person injured may repel by force, but even his servant then attending upon him, or any other person present, may interpose and prevent the injury, and in the latter case the owner, or any member of his family, even a lodger with him, may kill the assailant to prevent mischief. *Scribner v. Beach*, 4 Den. 451, citing *Foster's Crown Law*, 273.

The owner of property is not obliged to stand by and see a thief or trespasser take the same from his premises. Nor is he limited to mere verbal remonstrances. The force which may be exerted depends upon the exigencies of the particular case. If the retaking of the property is resisted the owner may lawfully use so much force as may be necessary to prevent it. This rule also holds as to the agent of the owner. *Gyre v. Culver*, 47 Barb. 592.

It is held in *People v. Hubbard*, 24 Wend. 368, that a sheriff may be lawfully resisted in carrying away property from a house, the outer door of which being shut, he opened, for the purpose of levying under execution.

The general principle seems to be that the owners of either real or personal property are justified in resuming possession of their goods if it can be done without violence or breach of the peace. *Scribner v. Beach*, 4 Den. 448.

As to the retaking of personal property by mere act of the party, see 3 Bl. Comm. 4.

One who has lost possession of a chattel through the act of his agent in leaving it upon the premises of another party, cannot enter and take the same by force, and if he is resisted by the owner of the premises, under such circumstances the owner is not liable as for assault and battery. *Newkirk v. Sahler*, 9 Barb. 652.

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In respect to personal property the right of recaption exists with the caution that it be not exercised violently or be a breach of the peace, for should these accompany the act the party would be answerable criminally. *Scribner v. Beach*, 4 Den. 448. See also *Spencer v. McGowen*, 13 Wend. 256.

In a criminal case it was held that one cannot justify an assault and battery in exercising the right of recaption of goods taken under attachment against another person, if the process of the officer is regular on its face, even though the person issuing it had no jurisdiction. *People v. Cooper*, 13 Wend. 379.

## SUBDIVISION 5.

## Consent.

The consent of the person assaulted is a complete defense in a civil action. Thus, where a husband and wife sued the defendant for assault and battery in a case where the defendant, at the request of the wife, rescued her from the husband to prevent him from taking her away from a Shaker settlement, which she did not wish to leave, it was held that the consent and request of the wife was an entire defense. *Pillon v. Bushnell*, 5 Barb. 156.

Though there is some conflict of opinion it would seem that consent is not a defense to the criminal action of assault and battery, because in such an action the public acts as plaintiff, and not the person injured. See opinion of Stephens, J., in *Reg. v. Coney*, 8 Q. B. Div. 534.

The consent of an infant to an indecent assault is no defense in a criminal prosecution. *Hays v. People*, 1 Hill, 352; *Singer v. People*, 15 Hun, 418, affirmed 75 N. Y. 608. Though in the criminal case of *People v. Parsons*, 2 N. Y. Cr. 114, it was held that the assent of a child, even of tender years, is a defense to a charge of indecent assault. To the contrary, see *Hays v. People*, 1 Hill, 352.

The consent of the female is a defense to an action for assault and battery coupled with rape. See 1 Bishop on Criminal Law, §§ 259-261, 733.

It seems that consent to an indecent assault is a defense in a civil action for damages. The court said: "The jury must still be satisfied that there was no consent, and that resistance was made to the extent of the woman's ability. What that ability was, must, in many cases, depend not only upon her strength and power to

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defend herself or make herself heard, but also upon the element of fear when it exists." *Dean v. Raplee*, 145 N. Y. 324.

It was held, however, in this case that the age, strength, and relation of the parties, etc., are all elements which bear upon the question of consent, which, under the facts of the case, is a question for the jury.

In a criminal case it was held that a conviction cannot be sustained where no battery has been committed, attempted, intended, or threatened by the party accused, and there is no exception to this rule in the case of an indignity offered to a female where she is a consenting party to the act involving her own dishonor. *People v. Bransby*, 32 N. Y. 525.

In a criminal prosecution for indecent assault and battery upon young girls under twelve years of age, it is not necessary to show positive resistance on their part.

In regard to consent to a prize-fight as a defense to a civil action there is an unfortunate conflict of authority, and in some cases an apparent misapprehension of the principles to be applied.

The consent of parties to a prize-fight is no defense in a criminal action for the breach of peace, as the public is plaintiff, and both parties are in the wrong. See 1 Bishop on Criminal Law, §§ 257-263; 2 Bishop on Criminal Law, §§ 35, 36.

In respect to prize-fights the doctrine is thus stated: "There is no doubt that prize-fights are altogether illegal; indeed, just as much so as that a person should go out to fight with deadly weapons, and it is not at all material which party strikes the first blow; and all persons who go to a prize-fight to see the combatants strike each other, and who are present when they do so, are, in point of law, guilty of assault. 1 Russell on Crimes, 854; *Rex v. Perkins*, 4 Car. & P. 537, 19 E. C. L. 515.

The later English doctrine seems to overrule the earlier cases, and in the case of *Reg. v. Coney*, 8 Q. B. Div. 534, it was held that to prove that defendant was voluntarily at a fight and looking on, without other evidence, is not enough to justify a conviction for aiding and abetting the fight.

1 Bishop on Criminal Law, §§ 632, 633, states as follows: "A mere presence is not sufficient, nor is it alone sufficient in addition, that the person present, unknown to the other, mentally approves what is done. There must be something going a little further, as, for example, some word or act. The party to be charged must, in

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the language of Cockburn, Ch. J., 'incite or procure, or encourage the act.' "

The criminal aspect of prize-fights in this State is governed by section 458 of the Penal Code.

In respect to the effect of consent to a prize-fight, as bearing on a civil action, there is some contradiction among the authorities. It has frequently been held that consent of the plaintiff to the fight is no bar to his action. *Bell v. Hansley*, 3 Jones (N. C.), 131; *Stout v. Wren*, 1 Hawks (N. C.), 420, 9 Am. Dec. 653; *Adams v. Wagner*, 33 Ind. 531, 5 Am. Rep. 231; *Com. v. Colberg*, 119 Mass. 350, 20 Am. Rep. 328.

Though consent of the plaintiff to the fight may be given in mitigation of damages. *Adams v. Wagone*, 33 Ind. 531, 5 Am. Rep. 231; *Logan v. Austin*, 1 Stew. (Ala.) 476.

So it will be seen that many decisions hold that the doctrine of leave and license, or the maxim of *volenti non fit injuria* does not apply in assault and battery upon the ground that the consent to a prize-fight is in itself illegal. See also Pollock on Torts, chap. 4.

In the true theory of civil wrongs the party to a prize-fight would have no civil action against his opponent for the assault as he has consented thereto. Nevertheless there are cases where the defense between a civil and criminal action seem to be overlooked, and which have held that one may maintain a civil action for battery in an affray to which he consented. See *Adams v. Wagoner*, 33 Ind. 531; *Stout v. Wren*, 1 Hawks (N. C.), 420; *Bell v. Hansley*, 3 Jones (N. C.), 131; *Com. v. Colberg*, 119 Mass. 350.

Bishop on Non-Contract Law says (§ 196), that decisions like this have proceeded on a misapprehension, overlooking the established law not brought to the notice of the judges, and should not be followed in future cases.

There is a difference, of course, in respect to fights which are more in the nature of games, as, for example, fencing or playing with blunt swords. These are lawful because the players mean no harm for each other, as is shown by their masks and pads.

This principle was brought out in the case of *Reg. v. Coney*, 8 Q. B. Div. 534, the court writing as follows: "The true view is, I think, that a blow struck in anger, or which is likely or is intended to do corporeal hurt, is an assault, and that an assault

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being a breach of the peace and unlawful, the consent of the person struck is immaterial. If this view is correct, a blow struck in a prize-fight is clearly an assault; but playing with single sticks or wrestling do not involve an assault; nor does boxing with gloves in the ordinary way."

As to the effect of consent as a defense for assault and battery, see *Barholt v. Wright*, 45 Ohio St. 179, 12 N. E. 185.

The doctrine of contributory negligence on the part of the plaintiff has no application in an action for assault and battery. *Kain v. Larkin*, 56 Hun, 79, 9 N. Y. Supp. 89.

## SUBDIVISION C.

## Accident.

There is no liability for assault and battery arising from inevitable accident, or which ordinary human care and foresight are unable to guard against. It was so held in a case where the defendant's child threw a stone which struck plaintiff's daughter, putting her eye out, and where it did not appear that the injury was inflicted by design or carelessness, but on the contrary that it was accidental. *Harvey v. Dunlop*, Hill & Den. 193, citing *Weaver v. Ward*, Hob. 134; *Gibbon v. Pepper*, 4 Mod. 405; *Wake-man v. Robinson*, 1 Bing. 213; *Bullock v. Babcock*, 3 Wend. 391.

The latter case cites several early cases where, although the injury was accidental, the defendant was held in trespass; as for example, where in shooting at butts an archer's arrow glanced and struck another. Year-Book, 21 Hen. VII, 28a. Or where persons were exercising at arms, one whose gun accidentally went off was held liable in trespass for the injury caused. *Weaver v. Ward*, Hobart, 134. In the last case it was said: "Therefore, if a lunatic hurt a man he shall be answerable in damages and no man shall have an excuse of trespass unless it shall be done utterly without his fault."

In the case of infants it seems that an injury might properly be considered unavoidable accident which would not be so considered if done by an adult. *Bullock v. Babcock*, 3 Wend. 391.

In *Scott v. Shepard*, 2 W. Bl. 894, it was held that if one assaults another who in lifting up his stick to defend himself hits a third person, that, nevertheless, an action lies against the person giving the accidental blow. But in *Morris v. Platt*, 32 Conn. 75, it was held that where a person in lawful self-defense fires a

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pistol at another and wounds an innocent bystander, he is not liable if he is not guilty of negligence. For the same principle, see *Paxton v. Voyer*, 67 Ill. 132, also *Brown v. Kendall*, 6 Cush. 292. But one may be liable for an injury to a third person resulting from a scuffle between two others, although done from good nature and from good motives. *Johnson v. McConnell*, 15 Hun, 293.

For a case discussing at some length the question of intent and of accident in trespass, see *Percival v. Hickey*, 18 Johns. 257.

On this subject see also *Laidlaw v. Sage*, 158 N. Y. 73.

Where the blow which constituted the assault and battery was directed toward another person in anger, but accidentally hit the plaintiff, it was held that this was not an accident which would justify the assault. *Corning v. Corning*, 6 N. Y. 103.

## SUBDIVISION 7.

## Provocation.

Provocation is not, strictly speaking, a defense, but only goes in mitigation of damages.

The following extract from the opinion of Spencer, Ch. J., in *Lee v. Woolsey*, 19 Johns. 320, gives the general statement regarding the bearing of provocative words and acts as a defense: "The evidence offered and overruled could neither be admitted in mitigation of damages, nor as explanatory of the transaction. The only view in which the evidence could be admissible would be for the purpose of showing that the defendant, under the influence of excited and irritated passions, was impelled by a sense of the injury done to him by the plaintiff, thus to redress himself. The law, in tenderness to human frailties, distinguishes between an act done deliberately and an act proceeding from sudden heat. If, upon a sudden quarrel, two persons fight, and the one kills the other, this is manslaughter only. So, if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, though this is not excusable, the offense is a mitigated homicide; for there is no previous malice. But in every case of homicide upon provocation, if there be a sufficient time, intervening the affront and the killing, for passion to subside, and reason to interpose, the offense becomes murder. In analogy to this principle, evidence in civil actions for assaults and batteries, in mitigation of damages, has been admitted, to

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show a provocation on the part of the party complaining of the injury. But the provocation must be so recent as to induce a fair presumption that the violence done was committed during the continuance of the feelings and passions excited by it. On any other principle, the law would countenance the most revengeful feelings; and indirectly, also, an appeal by persons conceiving themselves injured, to force and violence."

The mere utterance of words, however insulting and unjustified, are not an excuse in assault, although evidence thereof may be given in mitigation of damages. So held as to a common carrier where a passenger used indecent, insulting, and provoking language to a conductor. Held, that this did not prevent a recovery against the carrier, although evidence of the improper language was admissible in mitigation of damages. *Webber v. Brooklyn, etc., R. R. Co.*, 47 App. Div. 306, 62 N. Y. Supp. 1, distinguishing *Scott v. Central Park, North & East River R. R. Co.*, 53 Hun, 414, 6 N. Y. Supp. 382, as to the extent to which an owner or occupant of property may act in protection of his possession. See *Foye v. Sewell*, 21 Abb. N. C. 15; *Conway v. Carpenter*, 80 Hun, 428, 30 N. Y. Supp. 315.

Provocation is no defense to an assault and battery where there has been time for reflection and for the passions to cool, and cannot be taken into consideration by the jury in assessing damages. *Ellsworth v. Thompson*, 13 Wend. 658; *Lee v. Woolsey*, 19 Johns. 319.

Provocation, in order to be given in evidence, must be so recent and immediate as to induce a presumption that the violence was done under the immediate influence of the feelings and passions excited by it. Thus, the defendant cannot show any acts or declarations of the plaintiff, no matter how provocative, if they are not so connected that they must clearly be considered as part of the one and same transaction with the assault. *Lee v. Woolsey*, 19 Johns. 318.

The fact that a passenger while remonstrating with a conductor used indecent and provoking language does not justify a conductor in assaulting him, or prevent the passenger from recovering from the company. It seems, however, that this would not be the case if he had used the language with the intention of bringing about the assault. *Webber v. Brooklyn, etc., Ry. Co.*, 47 App. Div. 306, 96 St. Rep. 1, 62 N. Y. Supp. 1.



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## SUBDIVISION 8.

## Justification.

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§ 1. **Husband and wife.**— At common law in England a husband could chastise his wife gently. Bacon's Abr., tit. "Assault and Battery," chap. 373; 1 Bl. Comm. 444.

At common law a husband might give his wife a moderate correction upon the theory that as he was responsible for her misbehavior, it was reasonable that he should have the power of restraining her by domestic chastisement, the same as a man is allowed to correct his apprentices or children. See 1 Bl. Comm. 444.

The Supreme Court of North Carolina, following the common law, decided that a husband had the right to whip his wife "with a stick as large as his finger, but not larger than his thumb." *State v. Rhodes*, Phill. (N. C.) 453 (1866).

But modern authorities do not recognize this rule and it is considered a barbarous custom. See *Schackett v. Schackett*, 40 Vt. 195; *Commonwealth v. McAfee*, 108 Mass. 458; *People v. Winters*, 2 Park. Cr. 10. It should be remembered, however, that as between husband and wife in a civil action, this defense could never be urged by the husband to justify an assault, because the wife cannot sue the husband in a civil action for assault and battery. Webb's Pollock on Torts (Enl. Am. ed.), 150; *Abbe v. Abbe*, 22 App. Div. 484, 48 N. Y. Supp. 25.

A husband may defend himself against the attack of his wife, and may restrain her from using violence against herself or others, though he has no right to beat her or inflict punishment upon her. *People v. Winters*, 2 Park. Cr. 10.

§ 2. **Parents and teachers.**— Parents, of course, may physically chastise their children. 1 Bl. Comm. 452. In the early Roman law the father had power of life and death over his children on the theory that he who gave had also the power to take away. A parent is liable for excessive beating of his child, but what constitutes excess is a question for the jury. *Johnson v.*

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*State*, 2 Humph. 283. On the general subject, see *State v. Jones*, 95 N. C. 588; *People v. Cooper*, 8 How. Pr. 288. Of course, a parent cannot inflict unreasonable punishment upon a child. *Fletcher v. People*, 52 Ill. 395; *Commonwealth v. Coffey*, 121 Mass. 66.

By section 223 of the Penal Code, subdivision 4, force or violence toward the person of another is not unlawful when committed by a parent, or authorized agent of any parent, or by any guardian, master, or teacher in the exercise of lawful authority to restrain or correct his child, ward, apprentice, or scholar, and the force or violence used is reasonable in manner and moderate in degree.

Where a person having a niece, who was also his adopted daughter, struck her in anger, aroused by seeing her riding with a person who had seduced her and with whom she was living, he was held liable in damages for assault and battery. "The defendant did not stand in a position, or hold any relation with her, enabling him to claim any better ground than any other good citizen could, to mitigate the damages for personal violence upon her, by reason of excited feelings from such a cause." *Corning v. Corning*, 6 N. Y. 104.

Where a father directed one as his agent to bring his son from one place to another, and where such agent was obliged by the resistance of the son to employ constraint, using no more force in effecting his purpose than was necessary, it was held that an action for false imprisonment and assault and battery could not be maintained against the agent. *Hernandez v. Carnobeli*, 10 How. Pr. 433, 4 Duer, 642.

A teacher may punish his scholar for refractory conduct if the punishment is not unreasonable. *Morris's Case*, 1 City H. Rec. 52.

Of the relation of a teacher and his pupil the court says, in *Starr v. Liftchild*, 40 Barb. 541, of the teacher, standing in the place of the parent, "He had all the rights incident to that relation; and upon the question of the transgression of the rules of the school, or the observances necessary to the government and good order of his family, we regard his authority as all but absolute, and not open to examination and inquiry. \* \* \* He is also the sole and absolute judge of the punishment to be inflicted, with this limitation, that it shall be reasonable and usual, and not destructive of the objects of the relation,

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or subversive of the contract under which the relation exists." (This was an action on contract; not for assault and battery.)

So a master may chastise an apprentice in the same way that a father may chastise his child, though such punishment must not be immoderate. Moreover, the authority is strictly personal. Nor can a master direct or permit another to chastise an apprentice for any offense whatever. *People v. Phillips*, 1 Wheel. Cr. Cas. 155.

A master was held criminally guilty of assault and battery for chastising an apprentice for attending a trial as a witness in obedience to a subpoena. *People v. Sniffen*, 1 Wheel. Cr. Cas. 552.

At common law the master of a vessel could inflict moderate correction for sufficient cause upon a seaman, and was guilty of assault and battery if he exceeded the bounds of moderation. *Brown v. Howard*, 14 Johns. 119.

As to the authority of a master over seaman, see 2 Bos. & P. 224; 3 Day, 285; Abbot on Shipping, 125.

At common law commanders in the navy, army, and masters of merchant vessels had authority to use violence to maintain discipline, but now by U. S. Rev. Stat. 239, 243, 284, and 900, flogging is forbidden in the army, navy, military prisons, and on board vessels of commerce.

The owners of a vessel are not liable, however, for any damages for the acts of the master in assaulting and injuring a seaman on the high seas. *Gabrielson v. Waydell*, 135 N. Y. 1 (Maynard, Finch, and O'Brien, JJ., dissenting).

§ 3. **Preservation of peace.**— A person witnessing an affray may lay hands upon those engaged in it for the purpose of putting a stop thereto. *Noden v. Johnson*, 16 Q. B. 218; *Timothy v. Simpson*, 6 Car. & P. 500.

Where the defendant, at the request of plaintiff, aided her against her husband, who wished to take her away against her will, it was held that the facts constituted a complete defense to an action subsequently brought by the husband and wife for assault and battery. *Pillou v. Bushnell*, 5 Barb. 161.

§ 4. **Expulsion from public places.**— Blackstone says: "Thus, too, in the exercise of an office, as that of church warden or beadle, a man may lay hands upon another to turn him out of church, and prevent his disturbing the congregation. And, if sued for this

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or the like battery, he may set forth the whole case, and plead that he laid hands upon him gently, *molliter manus imposuit*, for this purpose." 3 Bl. Comm. 121.

Though one must behave with decorum in a church, yet a regulation in such a church restraining one from going out during services is an infringement on natural liberty, and will not protect an officer acting under it. *People v. Brown*, 1 Wheel. Cr. Cas. 124.

But any person disturbing a religious meeting may be removed by the application of force sufficient for that purpose. *Wall v. Lee*, 34 N. Y. 141. It is not necessary that the disturbance should be willful. See also *Beckett v. Lawrence*, 7 Abb. Pr. (N. S.) 403.

In *Dowd v. Albany Ry. Co.*, 47 App. Div. 202, 96 St. Rep. 179, 62 N. Y. Supp. 179, it was held that a conductor of a closed street car was entitled to eject a passenger who entered with two rifles with bayonets attached, and a valise; that the only question for the consideration of the jury was whether he had used unnecessary force.

The master is liable for the act of his servant in removing a person from a railroad car when the act is not justified by the passenger's misconduct, if the act is committed by the servant in the business of the master, and within the scope of his employment, although in so doing he may depart from instructions. The same rule holds where there is a justifiable cause for ejection for use of excessive force, though not wantonly or maliciously. *Higgins v. Watervliet Turnpike & Ry. Co.*, 46 N. Y. 23.

But it seems that evidence must be given tending to prove that the master in some way assented to or sanctioned the assault and battery. See *Priest v. Hudson River R. R. Co.*, 65 N. Y. 589. See also *Hibbard v. N. Y. & E. R. R. Co.*, 15 N. Y. 455, distinguished and limited in *Higgins v. W. T. & R. R. Co.*, 46 N. Y. 23; *Sanford v. Eighth Ave. R. R. Co.*, 23 N. Y. 343.

It is lawful for a passenger who refuses to pay his fare to resist an attempt to eject him from the railroad car while it is in rapid motion. The court says: "A person cannot be thrown from a railroad train in rapid motion without most imminent danger to life, and, although he may be justly liable to expulsion, he may lawfully resist any attempt to expel him from the train in such a case. As the refusal of the passenger to pay his fare will not

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justify homicide, so it fails to justify any act which in itself puts human life in danger. *Sandford v. Eighth Ave. R. R. Co.*, 23 N. Y. 345, reversing 7 Bosw. 122.

A carrier of passengers who has given to one person the sole right to take and deliver baggage may eject another person who attempts to transact such business after he has been ordered to desist. *Barney v. Oyster Bay & H. S. B. Co.*, 67 N. Y. 301.

A conductor may eject a passenger from a train who refuses to pay his fare, if he uses no unnecessary force and if the train has been stopped for the purpose, and such right of ejectment is not taken away by such person then offering to pay his fare. *People v. Gilsen*, 3 Park. Cr. 234.

Where a railroad company has a rule requiring conductors not to allow an intoxicated person to ride upon their cars, it applies such rule at its peril; thus, a company was held liable for the act of its conductor in forcibly removing from a car the plaintiff, who was afflicted with St. Vitus' dance, which he mistook for intoxication. *Regner v. Glens Falls, etc., R. R. Co.*, 74 Hun, 202, 56 St. Rep. 300, 26 N. Y. Supp. 625.

An incorporated society, such as an agricultural society, may employ persons to preserve order on its grounds during a fair, and to charge persons for occupying seats, etc., and to expel by force, if necessary, all who attempt to keep such seats without paying the price demanded. But, before such persons can be excluded, it must be shown that compensation for the use was requested, and that the occupant knew of the requirement, and with knowledge thereof and after a demand refused to pay. But after the forcible removal of a person from the seat there is no justification for turning him out of the ground, for admission to which he has paid. *Magovern v. Staples*, 7 Lans. 145.

One who expels another by force who is asserting his right to possession, after being wrongfully put out, cannot justify his action by a claim of right to possession. *Newman v. Marshall*, 20 J. & S. 202.

One cannot be expelled from a public place except for cause, and for an illegal expulsion the defendant is liable in damages for the indignity and disgrace of such public expulsion. *Smith v. Leo*, 92 Hun, 242, 72 St. Rep. 314, 36 N. Y. Supp. 949.

For a case in which the removal of a person holding a mutilated ticket from a ferry was held to be justified, see *Henly v. D., L. &*

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*W. R. R. Co.*, 28 Misc. Rep. 499, 59 N. Y. Supp. 857, affirming 27 Misc. Rep. 811, 57 St. Rep. 396.

In *Foley v. Metropolitan Street Car Co.*, 80 App. Div. 257, 80 N. Y. Supp. 249, the defendant was held liable for an assault by the conductor, distinguishing *Nolan v. Metropolitan Street R. R. Co.*, 65 App. Div. 184, 72 N. Y. Supp. 501.

But a street railroad company is not liable for an assault on a passenger by a conductor, which was provoked by the act of the passenger. *James v. Metropolitan Street Ry. Co.*, 80 App. Div. 364, 80 N. Y. Supp. 710.

A passenger on a railroad train must subordinate his conduct to all rules of the company that are reasonable and valid. It is the duty of the conductor to execute and enforce them; if there is some fact or omission behind the rules not apparent upon the face of the transaction, the passenger must resort to some other remedy for his grievance beside the use of force against the conductor, and if, under such circumstances, he invites a personal collision with him, he puts himself in the wrong, and cannot sue the company or the conductor for damages for assault and battery.

The fact that a railroad passenger, by reason of the absence of the ticket agent, is unable to procure a ticket before entering the train, is no justification for his forcible resistance to an ejection therefrom when, having refused to pay the additional fare required of passengers without tickets by a rule of the company, made under express statutory authority, the conductor, without undue force, ejects him; and neither the company nor the conductor is liable for damages in an action for an assault and battery brought by the passenger; under such circumstances, it is his duty to pay the additional fare or submit to an ejection, and then resort to his remedy for the negligence or mistake of the ticket agent. *Monnier v. N. Y. C. & H. R. R. Co.*, 175 N. Y. 281.

§ 5. *Officers of justice.*—An officer of justice who is assaulted by one upon the premises when he enters peaceably to make an arrest for a violation of the Excise Law, completely justifies his act in arresting the plaintiff, when he had reason to believe that a violation of such law was being committed, and where he was assaulted by the plaintiff without just cause. *Park v. Gilligan*, 14 Misc. Rep. 121, 35 N. Y. Supp. 477.

A person serving a subpœna has legal license to enter a house of another peaceably for that purpose, and when there it is not as-

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sault and battery for him to overcome any resistance he may meet with in the service of the subpœna. He is only liable for acts of violence that were not necessary to overcome the resistance. *Hager v. Danforth*, 20 Barb. 16.

Even though the person is incapable of levying any process, the owner of the property is not authorized to use unreasonable or unnecessary violence in resisting the execution of such process. *People v. Gulick*, Hill & Den. Supp. 229.

One cannot justify an assault and battery upon an officer taking goods under attachment, if the process of the officer is regular on its face, even though issued by one not having jurisdiction of the subject-matter. *People v. Cooper*, 13 Wend. 379.

It is held in *People v. Hubbard*, 24 Wend. 368, that a sheriff may lawfully be resisted in attempting to carry away property from the house, the outer door of which, being shut, he opened for the purpose of making a levy under execution. The court denies that the sheriff in such a case is protected as to the levy.

A policeman who goes upon private property without a warrant or process has no authority to determine the right of possession of personal property between adverse claimants, and if he uses force in taking possession thereof he is liable to damages. *Isaacs v. Flahive*, 35 N. Y. Supp. 716, 70 St. Rep. 450, 14 Misc. Rep. 249.

A police officer is liable in damages in a civil action for assault and battery which he commits while conveying a person whom he has arrested to the station-house. See *Ennis v. Dudley*, 22 Misc. Rep. 5, 48 N. Y. Supp. 622, 82 St. Rep. 622.

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## PARTIES.

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## SUBDIVISION 1.

## Plaintiffs.

The action is usually brought by the party upon whose person the assault is committed, and it may be stated generally that it lies in the favor of such person in all cases, whether he be adult

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or minor, sane or insane; or, if the battery causes death, then by his personal representative.

But a wife cannot maintain a civil action for assault and battery against her husband, for in law they are one person. Nor, it seems, did the Domestic Relations Law (Laws 1896, chap. 272, § 27), which gave to the wife a right of action for injury to her person, change the law in this respect. Nor is such action maintainable as "for an injury arising out of the marital relation." *Abbe v. Abbe*, 22 App. Div. 484, 48 N. Y. Supp. 25, 82 St. Rep. 25, citing *Schultz v. Schultz*, 89 N. Y. 644, which reversed 27 Hun, 26.

While a wife cannot bring a civil action for assault and battery against her husband, yet a woman who by fraud was induced to marry defendant, when by law he was incompetent to marry, may be allowed to recover damages in an action which combined an action for fraud and one for assault, although she did not procure a formal annulment of the marriage contract, the marriage itself being void *ab initio*. *Blossom v. Barrett*, 37 N. Y. 434.

A parent may bring an action for assault and battery upon his child, and the foundation of such action is the loss of services and the expense and trouble of the parent; therefore, punitive damages cannot be awarded in this action. But at the same time another action lies on behalf of the child injured, in which action punitive damages may be recovered. *Conden v. Wright*, 24 Wend. 428.

And the same rule holds where the action brought by the parent is for indecent assault; then only damage for loss of services can be obtained. There is a distinction between an action by a parent for *indecent assault* and an *action for seduction*, and while in the latter case punitive damages may be obtained, they cannot be recovered in the former except upon suit by the person assaulted. *Whitney v. Hitchcock*, 4 Den. 463.

A parent may have an action for assault upon his son, but in such action he cannot recover for injury to his feelings. There are two remedies; one on behalf of the parent, and the other on behalf of the child, and the two remedies are sufficiently liberal and more onerous to the defendant than where he is confined to a single action for the assault. *Cowden v. Wright*, 24 Wend. 428.



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## SUBDIVISION 2.

## Defendants.

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§ 1. **Joint tort feorsors.**— Persons natural or corporate are liable for their assaults; but joint tort feorsors may be joined as defendants in actions for assault and battery, and, where several defendants have participated in the wrong, each is liable for the damages charged against the most culpable. *Hoffman v. Schwartz*, 11 Civ. Proc. 200.

One who is present and instigates and encourages those who are actually using physical violence is liable for assault and battery. *Newman v. Marshall*, 20 J. & S. 302.

The party who directs or excites the commission of a crime of trespass, such as assault and battery or false imprisonment, is guilty as principal, and when sued in a civil action cannot be permitted to show that the trespass would have been committed without his interference. *Coats v. Darby*, 2 N. Y. 517, overruling *Herrick v. Manly*, 1 Cai. 252.

In a criminal case it was held that where one driving with immoderate speed knocked down a woman on the street, that a person riding with him and who assented to such immoderate speed was liable for assault and battery. *Jacques Case*, 5 City H. Rec. 77.

§ 2. **Infants and lunatics.**— Infants equally with adults are liable for trespass, slander, assault, etc. But it seems that where the assault is made by an infant that might probably be considered unavoidable accident which would not be so if the assault were committed by an adult. *Bullock v. Babcock*, 3 Wend. 393, citing *Bingham on Infancy*, 110; 8 T. R. 335; 16 Mass. 389; 2 Inst. 328. See 4 Den. 175.

So, too, a lunatic is civilly liable in damages for assault and battery. See *Bullock v. Babcock*, 3 Wend. 393; *Weaver v. Wood*, Hobart, 134.

But a lunatic is liable civilly in assault and battery only for the actual injury resulting; and he is not criminally liable as he is

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not a free agent capable of voluntary action, and is, therefore, incapable of malicious intent, which is the essence of a crime. *Krom v. Schoonmaker*, 3 Barb. 647.

§ 3. **Assaults by agents and servants.**—At common law a husband was liable to be sued jointly with his wife for her torts, whether committed prior to or during coverture. For the general principle see *Rowe v. Smith*, 45 N. Y. 230; *Kowing v. Manly*, 49 N. Y. 192. But this rule was changed by chapter 51 of the Laws of 1890, now section 27 of the Domestic Relations Law, which provides, in speaking of the wife, “that she is liable for her wrongful and tortious acts; her husband is not liable for such acts unless they were done by his actual coercion or instigation; and such coercion or instigation shall not be presumed, but must be proved.”

A master is liable for an assault committed by his servant under the master's direction, and if the assault is aggravated the court will not interfere with a verdict awarding punitive damages. *Smith v. Flannery*, 53 St. Rep. 159, 23 N. Y. Supp. 201.

Private persons are liable for assaults by their servants, as where one committed assault and battery under the direction of another, such person who directs or advises the assault is liable. *Hoffman v. Schwartz*, 11 Civ. Proc. 200.

A master is liable for an assault of his servant where he has directed him to take certain property, even though the servant act with lack of discretion and judgment. *Griffith v. Friendly*, 30 Misc. Rep. 393, 96 St. Rep. 391, 62 N. Y. Supp. 391.

If the agent, being authorized by his principal to retake real property, and although in order to accomplish that purpose he makes a willful assault, the principal is, nevertheless, liable as the agent is acting within the scope of his employment. *O'Connell v. Samuel*, 81 Hun, 361, 30 N. Y. Supp. 889, 62 St. Rep. 143.

Where a dealer told his agent that he must not touch or take goods for nonpayment of an installment due, the dealer was held not to be liable for an assault by the collector upon the vendee in attempting to retake the goods. *Feneran v. Singer Mfg. Co.*, 20 App. Div. 574, 47 N. Y. Supp. 284.

The owner of a store has been held liable as for assault and battery where a purchaser having put on an ulster had it taken from her by a saleswoman by order of the defendant's floorwalker, upon the ground that the plaintiff was a spy from a rival establishment. *Geraty v. Stern*, 30 Hun, 426.

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It has been held that the owners of a vessel are not liable for a willful and malicious act of its master in assaulting a seaman on the vessel on high seas, upon the ground that the master and the seaman were fellow-servants, but of different grades, and that the misconduct of the master is a risk assumed by the seaman and that the doctrine of *respondet superior* has no application. (Maynard, Finch and O'Brien, JJ., dissenting.) *Gabrielson v. Waydell*, 135 N. Y. 1, 47 St. Rep. 848, reversing 40 St. Rep. 991, 15 Supp. 976.

Corporations are liable for assault and battery of their servants when acting within the line of their instructions. *Shea v. Sixth Ave. R. R. Co.*, 62 N. Y. 180; *Lynch v. Metropolitan El. Ry. Co.*, 90 N. Y. 77 (false imprisonment); *Dwinelle v. N. Y. C. & H. R. R. Co.*, 120 N. Y. 117; *Higgins v. Waterliet Turnpike Co.*, 46 N. Y. 23; *Cohen v. Dry Dock, East Broadway & Battery R. R. Co.*, 69 N. Y. 170; *O'Connell v. Samuel*, 81 Hun, 357, 30 N. Y. Supp. 889. See *Monnier v. N. Y. C. & H. R. R. Co.*, 175 N. Y. 281.

And it is not necessary that the servant be expressly authorized to do the particular act if he is acting within the general scope of his authority. This is so even though he departs from the private instructions of the master and abuses his authority. Whether the servant was acting within the scope of his authority, or pursuing his own purpose willfully and maliciously is ordinarily a question for the jury. *Rounds v. D., L. & W. R. R. Co.*, 64 N. Y. 129; *Mott v. Consumers' Ice Co.*, 73 N. Y. 543.

In *Stewart v. Brooklyn & Crosstown Ry. Co.*, 90 N. Y. 588, it was held that a corporation was liable for an assault and battery of its servant, and the rule which relieves a master from liability for malicious injury by a servant when not acting within the scope of its employment does not apply as between a common carrier and a passenger. Such common carrier undertakes to protect the passenger against any injury arising from the negligence and willful misconduct of its servants, while engaged in the performance of the duty which a common carrier owes to a passenger. Compare *Isaacs v. Third Ave. R. R. Co.*, 47 N. Y. 122; *Putnam v. Broadway & Seventh Ave. Ry. Co.*, 55 N. Y. 108.

Where a brakeman assaulted the plaintiff, threw him down and trampled upon him, it was held that the proper action against the company was for assault and battery. *Priest v. H. R. R. Co.*, 10 Abb. Pr. (N. S.) 60, 40 How. Pr. 456, 2 Sweeney, 595.

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If a conductor wrongfully assaults a passenger because he has been insulted by mere words, the company will be liable for the consequence. *Weber v. Brooklyn, etc., R. R. Co.*, 47 App. Div. 306, 96 St. Rep. 1, 6 N. Y. Supp. 1.

For a case where a railroad company was held not to be liable for a defense made by its conductor when attacked by a passenger whom he had awakened, see *Russell v. N. Y. C., etc., R. R. Co.*, 12 App. Div. 160, 42 N. Y. Supp. 678.

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## SUBDIVISION 1.

## Complaint.

Where assault and battery results both in injury to property and person, such causes of action may be united in one complaint. *Bull v. Colton*, 22 Barb. 95; *Griffith v. Friendly*, 30 Misc. Rep. 392, 62 N. Y. Supp. 391.

Where assault results in injury both to person and property, a recovery upon one cause of action bars a recovery upon the other, as they arose out of the same transaction. *Bull v. Colton*, 22 Barb. 96.

A complaint in assault and battery against two defendants, which states that one defendant directed the commission of the assault by the other defendant's servants, is good. *Hoffman v. Schwartz*, 11 Civ. Proc. 200.

A complaint in assault and battery which seeks to charge defendant with an assault of his agent, but does not allege that such assault was made in the defendant's business, or that he instigated, aided, abetted, or sanctioned it, is insufficient, and a demurrer thereto will be sustained. *Andersen v. Schlessinger*, 16 Misc. Rep. 536, 38 N. Y. Supp. 296, 73 St. Rep. 663, citing *Garvey v. Fowler*, 4 Sandf. 667; *Cole v. Blunt*, 2 Bosw. 126; *Rodi v. Insurance Co.*, 6 Bosw. 24; *Stannard v. Eytinge*, 5 Robt. 92.

To the same effect see *Hamburg v. Singer Mfg. Co.*, 4 N. Y. Supp. 185, where it was held that although the complaint contained various allegations respecting the employment of a servant, and the

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Art. 6. Pleading.

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duties that appertain to the employment, it must, nevertheless, state that the assault was committed by the servant for the purpose of forwarding the master's interests and carrying out the work he was employed to do.

Allegations of assault and also of false imprisonment may be joined in the statement of one cause of action. But where the theory of the action is not disclosed, and it is impossible to see which allegations are set forth in chief, and which in aggravation, the plaintiff may be compelled to make his complaint more definite and certain by numbering his allegations, specifying which are set forth in chief, and which in aggravation. *Daly v. Wolaneck*, 29 Misc. Rep. 163, 60 N. Y. Supp. 162, 94 St. Rep. 162.

Where a complaint sets out for a first cause of action the assault, for a second cause false imprisonment, and asked a judgment for \$2,000, by reason of the premises, it was held that the complaint was properly drawn, and that it was not necessary to allege specific damage for each cause of action, and that it was error to charge that no recovery could be had under the first cause set out. *Walsh v. Dolan*, 39 St. Rep. 216, 15 N. Y. Supp. 96.

A complaint was held to allege but one cause of action where it was stated that the defendant assaulted the plaintiff, dragged him violently through the public streets, imprisoned him in the custody of the sheriff, and restrained him of his liberty without probable cause, whereby he was wounded, injured in credit, and hindered in business. *Sheldon v. Lake*, 9 Abb. Pr. (N. S.) 306, 40 How. Pr. 489.

But it was held that an allegation that such acts were in violation of law was irrelevant and redundant, and should be stricken out, because not traversable.

A complaint which combines in one count acts constituting an action for assault and battery, and also an action for slander, is bad on demurrer. *Anderson v. Hill*, 53 Barb. 238, overruling *Brewer v. Temple*, 15 How. Pr. 286.

The complaint in assault and battery may set out slanderous words, spoken by the defendant at the time of the assault, as these characterize its malicious intention, and proof of them is competent upon the question of damages. *Delmage v. Crow*, 22 Misc. Rep. 512, 49 N. Y. Supp. 1004, 83 St. Rep. 1004, reversed on another point, 23 Misc. Rep. 326.

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Special damages must be pleaded by the plaintiff desiring to recover the same; otherwise evidence of such damage cannot be given on the trial. *Stevens v. Rodger*, 25 Hun, 54.

See *Prince v. Ridge*, 32 Misc. Rep. 666, 66 N. Y. Supp. 454, for a case holding that the complaint stating that the defendant took hold of plaintiff's arm, she thinking he was to continue a conversation, and he making an indecent proposal, was held not to state a cause of action for assault and battery.

A cause of action for trespass upon personalty, and assault committed during said trespass, may be united in a single count in the complaint, and damages demanded for the combined injury. If the causes ought to be separately stated and numbered, the remedy is by motion, and not by demurrer. *Griffith v. Friendly*, 30 Misc. Rep. 393, 96 St. Rep. 391, 62 N. Y. Supp. 391.

Where the plaintiff was assaulted by the defendant's conductor, and drew his complaint in the form of an action for negligence on the defendant's part for employing such incompetent and unfit conductor, it was held that whether the action was one for negligence or for assault the liability of the defendant was the same, and that the plaintiff was entitled to have the testimony showing the assault submitted to the jury. That the assault by the conductor was, in law, a negligent act upon the part of the defendant. *Willis v. Street Ry. Co.*, 76 App. Div. 340, 78 N. Y. Supp. 478, 112 St. Rep. 478.

## SUBDIVISION 2.

## Answer.

As to right to plead in mitigation, see § 536, Code.

Facts not inconsistent may be set up in answer in assault and battery. Thus, the answer may set up (1) denial; (2) that the plaintiff committed the first assault; (3) that he was in defendant's inn making a great noise, and refusing to leave, the defendant gently laid hands upon him. *Lansing v. Parker*, 9 How. Pr. 288.

It has been held, however, that where the answer puts the assault in issue it cannot add justification. *Schneider v. Schultz*, 4 Sandf. 664; *Roe v. Rogers*, 8 How. Pr. 356.

In an action for assault and battery the defendant may set up a

## Art. 6. Pleading.

counterclaim for an assault, committed at the same time and place, by the plaintiff upon defendant. *Murphy v. McQuade*, 20 Misc. Rep. 671, 46 N. Y. Supp. 702.

Where the complaint alleged an unlawful entry of a dwelling and a battery of the plaintiff's person, and where the answer alleged that defendant entered under authority of a chattel mortgage upon the plaintiff's goods, and to assist in removing them and did not assault her, it was held that the answer raised no issue and was frivolous. Allegations in the complaint are not put in issue merely by statements inconsistent therewith in the answer. *Zwerling v. Annerberg*, 38 Misc. Rep. 169, 77 N. Y. Supp. 275, 111 St. Rep. 275.

Where the defense is that the act complained of was done in the defense of land, the answer must aver that the plaintiff was trespassing upon defendant's land, or interfering with his rights in respect to it, and that the defendant's acts were done in defense of those acts. *Johnson v. Gibson*, 23 Week. Dig. 433.

When time and place is immaterial, as in a complaint for assault and battery, a denial by the defendant that he made the assault on the day and at the place mentioned admits by implication that he committed the act on some other day, and, therefore, he will not be allowed to prove that the assault was committed by any one else. *Baker v. Bailey*, 16 Barb. 54.

A conjunctive denial is bad in assault and battery, as where the complaint alleges that the defendant assaulted the plaintiff and seized him and shook him, while the answer denies that the defendant did assault and seize him and shake him. *Hopkins v. Everett*, 6 How. Pr. 159.

Under the Code of Procedure, a partial defense may be pleaded, and thus in an action for assault and battery, facts constituting justification of a portion of the violence complained of, or facts in mitigation of damages, constitute a defense. *Foland v. Johnson*, 16 Abb. Pr. 235, citing *Bush v. Prosser*, 11 N. Y. 347.

In an action for assault and battery, where the defense was that the plaintiff was on defendant's property, it was held that the allegations of the answer, simply amounting to a claim of the right of possession by the defendant, did not raise an issue of title to real estate. That, therefore, the plaintiff was not entitled to the full bill of costs. *Welsh v. Fallehee*, 75 Hun, 308, 56 St. Rep. 777, 27 N. Y. Supp. 81.

Art. 6. Pleading.

Where the complaint contained a cause of action for fraud in inducing the plaintiff to marry him, and also an action for assault and battery, each of which causes appeared upon the face of the complaint, the defendant cannot take advantage of the misjoinder on trial, if he fails to demur to the same. *Blossom v. Barrett*, 37 N. Y. 434.

Where an answer admitted the assault and denied the aggravating circumstances alleged, setting forth facts constituting a provocation, it was held to be frivolous. Circumstances of aggravation are not traversable, and such new matter does not constitute a defense or counterclaim. *Gilbert v. Rounds*, 14 How. Pr. 46, citing 5 Wend. 134. See also *Lane v. Gilbert*, 9 How. Pr. 150.

Where a defendant admitted the assault, but denied that it was of the nature or extent stated in the complaint, it was held that no issue was raised, and that the plaintiff was entitled to assessment of damages. *Schnaderbeck v. Worth*, 8 Abb. Pr. 37.

In an action for assault and battery, where the answer, after denying the allegations of the complaint, alleged by the way of justification and mitigation, that whatsoever acts were done in relation to the plaintiff at the times and places specified in the complaint, were done without malice, and in discharge of his duty as a deputy-sheriff, and not otherwise, it was held that this portion of the answer was impertinent and irrelevant. *Moore v. Devoy*, 37 How. Pr. 18.

COMPLAINTS.

Assault and Battery.

SUPREME COURT — WASHINGTON COUNTY.

CHARLES A. LANGDON

agst.

ROSLINE A. GUY.

} Complaint, 91 N. Y. 661.

The above-named plaintiff, complaining against the defendant, represents and shows that on the 6th day of September, 1879, at the town of Kingsbury, in the county of Washington and State of New York, the said defendant wrongfully and unlawfully entered upon the premises of the plaintiff, and into his dwelling-house, and then



## Art. 6. Pleading.

and there wrongfully and unlawfully did beat, bruise, wound and ill-treat this plaintiff, and vindictively and without the slightest provocation or cause, did deliberately, in a brutal manner, strike this plaintiff upon the head and other parts of his person, and did seize this plaintiff, and drag him out of his said dwelling-house, and did tear and injure the clothing of this plaintiff, and did attempt to handcuff and imprison this plaintiff, and did do him other bodily injuries, whereby he sustained damage to the amount of \$1,000.

WHEREFORE plaintiff demands judgment against the defendant for \$1,000, besides costs and disbursements of this action.

(Not verified.)

U. G. PARIS,  
*Plaintiff's Attorney.*

## Assault with Expulsion from Car.

## CITY COURT OF BROOKLYN.

JOHN A. STEWART, Plaintiff,

*agst.*

THE BROOKLYN & CROSSTOWN RAIL-  
ROAD COMPANY, Defendant.

} Complaint, 90 N. Y. 588.

The above-named plaintiff, complaining of the above-named defendant, alleges on information and belief:

I. That defendant is a corporation existing under and by virtue of the laws of the State of New York, and that as such corporation it is the owner of certain horses, cars, and franchises, and that it maintains and operates a railroad run by horses in the city of Brooklyn, in the State of New York.

II. That on the 31st day of January, 1879, plaintiff became a passenger in one of the cars belonging to defendant drawn by its horses, and driven by a servant or agent of the defendant; that he paid his fare and conducted himself in a quiet and orderly manner.

III. That on the said 31st day of January, and while said car was on its way to its destination, in the direction of Greenpoint, and while passing through Kent avenue, the driver thereof, without any just cause or provocation, on plaintiff's part, attempted by force, and great and unnecessary violence, to expel him, the plaintiff, from said car, and in doing so, assaulted and beat with a dangerous weapon upon the head and body of the plaintiff, and thereby wounding and bruising him, by reason of which he has sustained much suffering, distress, and great mortification of his feelings and manhood, and was subjected to much expense.

## Art. 6. Pleading.

WHEREFORE plaintiff demands judgment against defendant in the sum of \$10,000, with interest from 31st of January, 1879, together with the costs of this action.

(Verified.)

CHARLES M. TALLMAN,  
*Plaintiff's Attorney.*

## Assault with Missile.

## SUPREME COURT — RENSSELAER COUNTY.

PATRICK JOSEPH CONNORS, an Infant,  
by ELLEN CONNORS, his Guardian ad  
Litem, Plaintiff,

*agst.*

WILLIAM WALSH, Defendant.

Complaint, 131 N. Y. 590.

The plaintiff complains of the defendant and alleges:

*First.* That Patrick Joseph Connors is an infant under the age of twenty-one years and over the age of fourteen.

*Second.* That on the 19th day of July, 1890, upon application duly made by said infant, this plaintiff, Ellen Connors, was by an order duly made by Hon. Lewis E. Griffith, county judge of Rensselaer county, duly appointed the guardian of said infant, for the purposes of this action, and thereupon entered upon the discharge of said duties; said order was duly filed in the office of the clerk of Rensselaer county, on the 29th day of July, 1890.

*Third.* On information and belief that on the 4th day of July, 1890, at the city of Troy, N. Y., William Walsh, the defendant above named, with force and arms, assaulted said infant, and then and there with force and violence threw a certain instrument or missile, to wit, a large piece of brick, at said infant, thereby striking said infant, with great force and violence, in the face and head, by means of which premises said infant was greatly hurt, bruised, and wounded on his person, and severely injured in one of his eyes, and he became and was sick, sore and lame, and has ever since so remained and continued, and now remains and continues, and has thereby ever since suffered and underwent great pain, and is still undergoing and suffering great pain, and is in great danger of losing permanently the sight of one of his eyes, and by reason thereof has been and will be hindered and prevented in the use of said eye, and from performing and transacting his necessary affairs and business, and has also thereby been forced and obliged necessarily to pay, lay out, and expend a large sum of money in and about endeavoring to be cured of the

## Art. 6. Pleading.

bruises, wounds, sickness, lameness, and disorder aforesaid, occasioned as aforesaid, to the damage of the infant of \$5,000.

WHEREFORE the plaintiff demands judgment against the defendant for the sum of \$5,000, together with the costs of this action.

EDWARD W. DOUGLAS,  
*Plaintiff's Attorney.*

(Verified by plaintiff as *guardian ad litem.*)

## Assault with Rape.

## SUPREME COURT — WYOMING COUNTY.

GERTRUDE DEAN, an Infant, by SAMUEL  
K. MUNGER, her Guardian ad Litem,

*agst.*

MINERS RAPLEE.

Complaint, 145 N. Y. 319.

The plaintiff, by Samuel K. Munger, her *guardian ad litem*, complaining of the defendant, states and alleges the following facts, constituting her cause of action against the defendant:

I. The plaintiff alleges that she is an infant, under the age of twenty-one years, and of the age of twenty years, and by an order of Andrew J. Lush, county judge of Wyoming county, duly made, Samuel K. Munger was duly appointed *guardian ad litem*, for this plaintiff, for the purpose of this action.

II. That plaintiff states and alleges that on the 19th day of April, 1885, when the plaintiff was of the age of fourteen years, then having no father or mother living, the defendant, to induce this plaintiff to go to his house and do and perform such labor as she was capable of, promised to board, clothe, and educate this plaintiff, and treat her as one of his family, that he would in every respect treat her as his own daughter; that relying upon the promises of the defendant, she did, on or about the 19th day of April, 1885, go to the defendant's house in the town of Castile, in said county, and became a member of the defendant's family and continued to be a member thereof until April, 1887.

III. The plaintiff further states and alleges that while she was living at the defendant's house, and while she was a member of his family, the said defendant, disregarding his duty toward this plaintiff, to care for, and protect her, on or about the 1st day of March, and at different times in the years 1886 and 1887, at the town of Castile, wrongfully and wickedly assaulted this plaintiff, and by force and threats of personal violence, compelled this plaintiff to have

Art. 6. Pleading.

carnal connection and sexual intercourse with him, the said defendant, and without the consent and against the will of this plaintiff, by means of which said several acts of the defendant, the said plaintiff was then and there greatly hurt and wounded, became sick and sore, and continued so, and thereby her health was greatly impaired.

And the plaintiff further alleges that she suffered and still suffers great pain, caused by the several acts of the defendant, and has been prevented from performing labor, to her great damage \$10,000.

WHEREFORE plaintiff demands judgment against the defendant for the sum of \$10,000, with costs and disbursements of this action.

J. L. WOODWARD,  
*Plaintiff's Attorney.*

**ANSWER.**

**General Denial, with Justification, of Defense of Person and Property by Agent.**

**SUPREME COURT.**

CHARLES A. LANGDON

*agst.*

ROSALGINE A. GUY.

} Answer, 91 N. Y. 661.

*First defense:* The said defense for an answer to the complaint of the plaintiff in this action, and for a first and separate defense thereto, denies each and every allegation in said complaint contained.

*Second defense:* And for a second and separate defense said defendant avers that one Henry D. Langdon was the owner of, and in possession of a certain house in Kingsbury, Washington county, N. Y., on the 6th day of December, 1879; that on that day the plaintiff wrongfully and unlawfully entered such house and assaulted said Henry D. Langdon and his wife; that this defendant, who was then in the employ of said Henry D. Langdon, by the order and direction of said Henry D. Langdon, as he lawfully might do, resisted the said plaintiff in his assault upon said Henry D. Langdon and his wife, and in defense of said Henry D. Langdon and his wife, removed said plaintiff from said house, using no unnecessary force, which is the same act charged in said complaint.

*Third defense:* And for a third and separate defense said defendant avers, that on the 6th day of September, 1879, at the town of Kingsbury, Washington county, N. Y., he was a deputy sheriff of the county of Washington; that on that day said plaintiff wrongfully entered into the dwelling-house of one Henry D. Langdon and assaulted said

## Art. 7. Evidence.

Henry D. Langdon and his wife, and acted in a disorderly manner, and committed a breach of the peace, and deponent as such deputy sheriff, in defense of said Henry D. Langdon and his wife, as he lawfully might do, removed said plaintiff from said house, using no unnecessary force, which is the same act charged in the complaint in this action.

(No verification.)

HUGHES & NORTHRUP,  
*Defendant's Attorneys.*

## ARTICLE VII.

## EVIDENCE.

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## SUBDIVISION 1.

## Of Provocation.

Under a general issue or denial of fact charged, the defendant in mitigation of damages may give any evidence of provocation by the plaintiff, if it be so recent and immediate as to induce the presumption that the violence was committed under the immediate influence of the passion thus wrongfully excited by the plaintiff. But it would seem that provocation by a third party, at whom the blow is aimed, will not justify an assault upon the plaintiff. *Corning v. Corning*, 6 N. Y. 103 (citing *Lee v. Woolsey*, 19 Johns. 319; *Matthews v. Terry*, 10 Conn. 455).

Previous difficulties between the parties may be proved, as well as threats, as they aid in ascertaining who was the aggressor. *Murphy v. Dart*, 42 How. Pr. 31.

A long series of provocations before the assault may be proved. *Stellar v. Nellis*, 42 How. Pr. 163.

In an action for assault in removing plaintiff from church by the direction of a priest, evidence of the plaintiff's conduct on two other Sundays is competent on the question of justification. *Crowley v. Miller*, 19 Weed. Dig. 262.

Evidence of slanderous words spoken by the defendant at the time of the assault are admissible in evidence, as they show the

## Art. 7. Evidence.

malicious and evil intent of the defendant toward the plaintiff at the time, and may enable the jury to fix the proper rate of damages. *Delmage v. Crow*, 22 Misc. Rep. 511, 49 N. Y. Supp. 1004, 83 St. Rep. 1004, reversed 23 Misc. Rep. 326.

Evidence of continued and repeated insult by the plaintiff, done for the purpose of exciting the defendant and keeping him excited, may be shown. The question is not how many hours have elapsed since the provocation was given, but whether, in view of the circumstances of the case, the party has had reasonable time to cool his blood. Each case should be controlled by its own peculiar circumstances. *Dolan v. Fagan*, 63 Barb. 73.

But insulting acts and declarations of the plaintiff antecedent in time, and which cannot fairly be considered as part of the transaction, cannot be given in evidence, no matter how irritating or provocative. *Lee v. Woolsey*, 19 Johns. 318.

To the same effect, see *Ellsworth v. Thompson*, 13 Wend. 658.

For the same principle in an action for slander, see *Richardson v. Northrup*, 56 Barb. 109.

The rule upon the subject of antecedent provocative acts is well stated in *Stettlar v. Nellis*, 60 Barb. 524, as follows: "The evidence of acts done or words spoken by the plaintiff long before the cause of action arose is not admissible for the purpose of showing provocation or mitigation of damages. Yet where such acts and words are a portion of a series of provocations frequently repeated and continued down to the time of the assault they may be proven."

In an action for assault and battery which arose over a dispute regarding a stack of hay, part of which was claimed by plaintiff, and where the plaintiff testified that at the time he was going to remove the whole stack, while defendant testified that he was only going to take his share, it was held that the contents of a letter written by the defendant were admissible to show that he had previously threatened to take the whole. *Richardson v. Van Voorhis*, 3 N. Y. Supp. 599, 20 St. Rep. 667.

The defendant's belief in his own danger at the time of the assault is competent evidence in mitigation of exemplary damages. *Hogan v. Ryan*, 5 St. Rep. 110.

Evidence connected with the transaction which tended to show that the defendant acted maliciously may be given if the complaint set forth facts from which malice may be inferred, although

## Art. 7. Evidence.

there is no express averment that the assault was made with malice. *Elfers v. Wooley*, 116 N. Y. 294, 20 St. Rep. 678.

## SUBDIVISION 2.

## Of Intention.

In *Crossman v. Bradley*, 53 Barb. 125, it was held that in a civil action for damages for assault with intent to commit rape the proof to sustain the action must be of the same nature and degree as if the defendant were on trial upon an indictment for an attempt to commit rape, and that the case should be tried upon the same principles. Thus, all allegations which repel the allegation of force or tend to show that no violence was used or designed is admissible, and all evidence tending to show previous lewd conduct and inviting acts of the plaintiff are admissible.

In a criminal case it has been held that words are an important element in determining the intent with which the assault was committed, and may be proved. *Mulligan v. People*, 5 Park. Cr. 105.

In a criminal case it was held that where the defendant had been in the employ of plaintiff, evidence that the defendant had done his work with the intention to injure his employer was proper, and that the evidence of experts as to the location, character, and probable consequence of wounds, was proper as bearing upon the intent of the defendant. *People v. Kerrains*, 1 T. & C. 334.

As to evidence of defendant's intention, which was held insufficient to prove his liability, see *Laidlaw v. Sage*, 158 N. Y. 73, reversing *Laidlaw v. Sage*, 2 App. Div. 374, 37 N. Y. Supp. 770.

In order that the defendant might show his belief in his danger he may be allowed to prove that other persons with the plaintiff struck him during the affray. *Hogan v. Ryan*, 5 St. Rep. 110.

Where threatening words of the defendant's agent are set out in the complaint the defendant may be allowed to prove that he did not authorize the use of the threatening acts, as the same may be calculated to inflame the minds of the jury and increase the verdict against him. *Delmage v. Crow*, 23 Misc. Rep. 326, 85 St. Rep. 240, 51 N. Y. Supp. 240, reversing 22 Misc. Rep. 511, 49 N. Y. Supp. 1004.

In a case where the plaintiff was forcibly removed from a fair ground for not paying for a seat which he held, it was held that evidence of a regulation of the society authorizing the collec-

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tion of a charge for such seats might be shown. But that a custom to charge for such seats is not admissible when the person removed is not shown to have had any knowledge of such custom. *Magovering v. Staples*, 7 Lans. 145.

Where an assault and battery grew out of a dispute as to certain property it was held that evidence as to the possession of the property was competent. Though such evidence does not justify the assault, yet a belief in ownership was of the utmost importance in authorizing vindictive damages in order that the jury might know whether the assault was committed wantonly and without cause and in the belief that the defendant was asserting a legal right. *Linde v. Elias*, 4 Alb. L. J. 76.

Where the defense was that the plaintiff was unlawfully trespassing upon the defendant's land, evidence of a parol agreement for an exchange of land by the plaintiff with a former adjoining owner of the premises, and that a right of way had been granted to the plaintiff, is competent as tending to show good faith on the part of the plaintiff in entering upon the land and as tending to show a legal right in the plaintiff to cross the land. *Borst v. Zeh*, 12 Hun, 315.

## SUBDIVISION 3.

## Of Character.

Evidence of the dissolute character of the plaintiff is not admissible in mitigation of damages, and such a person is entitled to the same damages as one of good character. *Corning v. Corning*, 6 N. Y. 104.

Where the assault arose out of a forcible removal of a passenger from a railroad train, evidence of the passenger's previous threats, tending to prove his disposition to pick a quarrel, may be proven, although the threats did not come to the knowledge of the defendant, who, in this case, was the conductor. The evidence is proper to reduce vindictive damages. *Vedder v. Fellows*, 20 N. Y. 126.

In a criminal case it was held that the quarrelsome disposition of the plaintiff could not be shown by proof of specific acts upon his part where it was claimed by the defendant that the assault committed was done in self-defense. *People v. Frindel*, 58 Hun, 482, 35 St. Rep. 805, 12 N. Y. Supp. 498.

In a civil action for indecent assault specific acts of lewdness on the part of plaintiff with men other than the defendant may



## Art. 7. Evidence.

be shown in mitigation of damages, although not pleaded. It seems that such acts may be shown although they occurred after the assault, if they follow it so closely in point of time that they might be considered as indicating the state of plaintiff's "moral sensibilities" at the time of the assault. *Gulerette v. McKinley*, 27 Hun, 320, citing *Bracy v. Kibbee*, 31 Barb. 273; *People v. Abbott*, 19 Wend. 192; *Crossman v. Bradley*, 53 Barb. 125; *Ford v. Jones*, 62 Barb. 484; *Wandell v. Edwards*, 25 Hun, 489.

Where the complaint seeks to recover for assault and battery coupled with indecent assault, the plaintiff's character for chastity is directly in issue upon the question of damages, and specific acts of lewdness and immorality on part of plaintiff may be shown. *Ford v. Jones*, 62 Barb. 484.

In a civil action for assault and battery, coupled with indecent assault, the defendant may show improper familiarity between the plaintiff and other persons during a period prior to the assault, and at a time when from the date of the birth of her child she must have become pregnant. In this case it was also held that the defendant might prove certain acts showing the friendly manner of the plaintiff toward him after the assault. *Young v. Johnson*, 123 N. Y. 226, 33 St. Rep. 486, affirming 46 Hun, 164, 11 St. Rep. 590.

In a criminal action evidence of previous assault by the defendant are admissible upon the question of his motive and intent. So, also, evidence of other indictments are admissible. *People v. Flannigan*, 42 App. Div. 318, 59 N. Y. Supp. 101, 93 St. Rep. 101.

Compare, however, *Pontius v. People*, 82 N. Y. 339, affirming 21 Hun, 328.

## SUBDIVISION 4.

## Of Special Damage.

Items of special damage must be particularly stated in the complaint or they cannot be proved at the trial. The court in this connection said: "Doubtless the trial court had power to allow an amendment of the complaint on proper terms by inserting an allegation of the special damage to be proven, but no amendment was ordered and none was asked for." *Stevens v. Rodger*, 25 Hun, 54.

Unless evidence has been given as to what the plaintiff's time

## Art. 7. Evidence.

is worth the jury cannot allow for loss of time consequent upon an assault. *Kane v. Manhattan Ry. Co.*, 3 St. Rep. 145.

## SUBDIVISION 5.

## Miscellaneous — Weight of Evidence.

One sued civilly for assault and battery cannot in his own defense prove the record of a conviction, in the police court, of the plaintiff for assault and battery made upon him, because the record of conviction in a criminal case is not admissible in a civil action to prove the fact upon which it was rendered. *Ennis v. Dudley*, 22 Misc. Rep. 4, 48 N. Y. Supp. 622, 84 St. Rep. 622.

It seems that the fact that the defendant has been punished criminally for the same assault and battery cannot be given in evidence to mitigate damages in a civil suit. *Cook v. Ellis*, 6 Hill, 466.

As to expert testimony in respect to an injury received in assault and battery, see *Fort v. Brown*, 49 Barb. 366.

As to dying declarations of a person killed in an assault, and as to other evidence sought to be offered as part of the *res gestæ*, see *Spatz v. Lyons*, 55 Barb. 476.

Where an assault is committed in the absence of witnesses, ill-will on the part of the defendant toward the plaintiff is admissible as circumstantial evidence to determine by whom the assault was committed. *Jewett v. Banning*, 21 N. Y. 27, affirming 23 Barb. 13.

In a criminal case for assault and battery the prosecution is bound to prove beyond any reasonable doubt the charge made. But in civil case, under the same set of facts, a preponderance of proof is sufficient. *Dean v. Raplee*, 145 N. Y. 319, citing *People v. Briggs*, 114 N. Y. 56.

Where a person in whose favor a legal process is issued directs the acts of an officer to be done under it, he is responsible therefor, and cannot prove that the assault of the officer was not the consequence of the request. "No man is allowed to excite another to trespass, and after its commission to give his want of influence in evidence in bar of the action." *Coats v. Darby*, 2 N. Y. 517, overruling *Herrick v. Manly*, 1 Cai. 253.

Where an assault was committed by the defendant when asked by the plaintiff to leave the house of plaintiff, it was held that the defendant might show in justification and mitigation of damages

## Art. 8. Procedure and Trial.

that the plaintiff had no right to remove him. *Collier v. Moulton*, 7 Johns. 109.

Where the defendant was sued for assault and battery for attempting to kiss plaintiff, and he proved, in order to show license, that by a vote passed on an excursion train he was to go through the train and kiss every lady in the car, it was held that the exclusion of evidence by the plaintiff that she and her friends were a distinct party from those with the defendant, was improper. *Van Voorhis v. Hawes*, 12 How. Pr. 406.

A physician who has attended a person after an assault may testify as expert concerning the effect of the assault. *Anthony v. Smith*, 4 Bosw. 503.

In an action by a married woman for assault with attempt to rape it is error to ask the defendant on cross-examination whether he was living with his wife at the time of the offense. Such matter does not affect his credibility. *Haulish v. Boller*, 72 App. Div. 559.

## ARTICLE VIII.

## PROCEDURE AND TRIAL.

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## SUBDIVISION 1.

## Arrest and Attachment.

The right to arrest the defendant in an action for assault and battery is given by Code, § 549, subd. 2.

So, too, the right to attach property. See Code Civ. Proc., § 635, subd. 3.

As to right of execution against person, see Code Civ. Proc., §§ 1487-1490. See "Remedies," chap. VI.

By section 3177 of the Code, in such an action for assault and battery upon the high seas, the plaintiff may apply for an order of arrest to accompany the summons, in the form and to the effect specified in the following section. The following sections of the Code, up to and including section 3187, give the proceedings on such arrest, bail, and other matters connected with the arrest. But section 3187 provides that the article does not prevent the

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Art. 8. Procedure and Trial.

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plaintiff from commencing and conducting in the ordinary manner an action for a cause specified in subdivision 2 of section 317.

**SUBDIVISION 2.****Trial.**

If the assault is one with intent to commit rape, the court may, in its discretion, exclude all persons not directly interested from the court-room. Code Civ. Proc., § 5.

Although the action of assault and battery is transitory, and may be tried in a county other than where the assault occurred, yet, other things being equal, the court may regard the place of the assault as an important, if not a controlling, factor, in determining where the trial should be had. *Thompson v. Norwood*, 46 St. Rep. 204, 19 N. Y. Supp. 632.

In *Willis v. Metropolitan Ry. Co.*, 76 App. Div. 340, 78 N. Y. Supp. 478, 112 St. Rep. 478, the plaintiff, who had been assaulted by the defendant's conductor, drew his complaint in the form of an action for negligence, alleging that the conductor was incompetent, unfit, and unsuitable, to the knowledge of the defendant, etc., and that the defendant was negligent in employing him, etc. Under this complaint the court struck out all testimony tending to show assault, and dismissed the complaint on the ground that the cause set forth was for negligence, while the true cause of action was assault. *Held*, that, when once the relation of carrier and passenger is entered upon, the carrier is responsible for all the consequences resulting to the passenger from the willful misconduct or negligence of the persons employed, etc.; hence that, whether the action was for negligence or for assault, the liability of the defendant was the same in both cases, and that the plaintiff was entitled to have his case submitted to the jury. Furthermore, that, as there was an implied contract on the part of the defendant to carry the plaintiff safely, the assault by the conductor was in law a negligent act on the part of the defendant.

**SUBDIVISION 3.****Charge and Nonsuit, Etc.**

In a civil action, the defendant is entitled to a charge that "he is presumed innocent," as such presumption exists in civil actions, where a judgment against the defendant would show him to have

## Art. 8. Procedure and Trial.

been guilty of a crime. *Grant v. Riley*, 15 App. Div. 190, 44 N. Y. Supp. 238.

It is not error to charge that, if the plaintiff put his hands upon the defendant, the latter had a right to resist, and to use such force as would prevent the plaintiff from inflicting injury upon him. *Patterson v. McIlroy*, 28 J. & S. 130, 42 St. Rep. 960.

It is error to refuse to charge that the defendant has a right to insist that the plaintiff should vacate his store, and that the defendant need not be held liable if the plaintiff refused to go upon request, and the defendant only used so much force as was necessary to put him out. *Johnson v. Maxwell*, 19 Misc. Rep. 706, 43 N. Y. Supp. 1156.

It is error for the court to leave to the jury the question as to the reasonableness of a regulation of a street railroad company prohibiting passengers from taking packages or cumbersome goods into a car. The court should charge the jury, as a matter of law, that such a regulation is reasonable. It was also held that the judge should charge that a conductor was entitled to eject the plaintiff who entered a car carrying a valise and two rifles with bayonets attached. *Dowd v. Albany Ry. Co.*, 47 App. Div. 202, 62 N. Y. Supp. 179, 96 St. Rep. 179.

Where the defense in assault and battery was that the defendant was defending his master's wagon placed upon a private road, and where there is a conflict in the testimony as to whether the road was public or private, it is error for the court to charge that there was no defense in any view of the case, and that the only question was the amount of damages. *Howe v. Oldham*, 52 St. Rep. 734, 23 N. Y. Supp. 100.

For a case where the charge of the court in assault and battery was upheld, see *Kosters v. Brooklyn, etc., R. R. Co.*, 10 Misc. Rep. 18, 62 St. Rep. 644, 30 N. Y. Supp. 531.

For a charge which was held to be defective in respect to the rights of a deputy sheriff to remove plaintiff in the execution of a warrant of dispossession, see *McLaughry v. Porter*, 86 Hun, 316, 67 St. Rep. 190, 33 N. Y. Supp. 464.

For a case where the charge respecting the power of a jury to give damages was held to be erroneous, see *Millis v. Germond*, 3 App. Div. 383, 38 N. Y. Supp. 934.

It is proper to charge that if the jury find the assault malicious they may award punitive damages. It is error to refuse to charge

## Art. 8. Procedure and Trial.

that all the circumstances of the transactions are to be considered in determining whether there was malice or not on the part of the persons making the arrest. *Frost v. Pinkerton*, 61 App. Div. 566, 70 N. Y. Supp. 892, 104 St. Rep. 892.

It is error to refuse to charge that the jury may consider evidence of provocation in mitigation of compensatory damages as well as punitive damages. *Genung v. Baldwin*, 77 App. Div. 584, 79 N. Y. Supp. 569, 113 St. Rep. 569, reversing, on reargument, 75 App. Div. 195.

In *Hyatt v. Wood*, 3 Johns. 239, a new trial was refused, although the judge has misdirected the jury. This was upon the ground that the injury was trivial, and in a case where the verdict was for the defendant no ends of justice would be subverted by granting a new trial merely to give the plaintiff an opportunity to recover nominal damages.

In *Davison v. Herring*, 24 App. Div. 402, 48 N. Y. Supp. 760, 82 St. Rep. 760, an action brought for indecent assault, the verdict was set aside on account of statements made by the judge in the presence of the jury, to the effect that if the grand jury were in session he would send the case to them, and that the district attorney of the county had better present the case to the next grand jury. This was done, even though the court subsequently charged the jury to disregard his statements.

Though a verdict will not ordinarily be disturbed, yet it will not be allowed to stand where the jury ignored the weight of evidence. *Higgins v. Quinn*, 25 Misc. Rep. 292, 54 N. Y. Supp. 586. See this case also for facts where a verdict was considered to be against weight of evidence.

For a case of assault and battery where evidence was held to warrant a verdict, see *Caldwell v. Central Park, etc., R. R. Co.*, 7 Misc. Rep. 67, 57 St. Rep. 489, 27 N. Y. Supp. 397. See also *Townsend v. Stuart*, 53 St. Rep. 147, 23 N. Y. Supp. 638; also *Bensky v. Banks*, 30 St. Rep. 362, 8 N. Y. Supp. 935.

## SUBDIVISION 4.

## Costs.

In actions for assault and battery, if the plaintiff recovers less than \$50 damages, the amount of his costs cannot exceed the amount of damages. Code Civ. Proc., § 3228, subd. 3.

Though a wife cannot maintain a civil action against her hus-

## Art. 9. Damages.

band for assault and battery, yet, upon the failure of her action, costs will not be awarded against her. *Abbe v. Abbe*, 22 App. Div. 483, 48 N. Y. Supp. 25, 82 St. Rep. 25.

## ARTICLE IX.

## DAMAGES.

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## SUBDIVISION 1.

## Compensatory Damages.

Compensatory damages do not depend at all upon the motive which actuated the defendant, but punitive damages depend upon whether the act was reckless, willful, or malicious, and designed to oppress and injure the plaintiff. The court said: "If a cause of action is made out, the plaintiff is entitled to compensation, to be ascertained by the jury, whatever may have been the motive which actuated the defendant." *Voltz v. Blackmar*, 64 N. Y. 444.

It seems that the belief of the defendant, that he was asserting a legal right as a defense of property, will not affect the actual damage caused by him, though it may affect vindictive damages. *Linde v. Elias*, 4 Alb. L. J. 76.

Where the assault is committed by a lunatic, the plaintiff can only recover compensation for the injury, and not punitive damages. *Krom v. Schoonmaker*, 3 Barb. 647.

Damages may be recovered for an assault which consists of a mere menace of violence with a dangerous weapon by a person within striking distance, although the person menaced is not struck. *Liebstadter v. Federgreen*, 80 Hun, 245, 61 St. Rep. 621, 29 N. Y. Supp. 1039.

It has been held that, in assessing damages in assault and battery, the place in which the assault takes place may be taken into consideration. Thus, it was said by Bathurst, J., in *Tilldidge v. Wade*, 3 Wils. 19: "It is a greater insult to be beaten upon the Royal Exchange than in a private room." So, too, an aggravation of an existing disease may be considered in assessing damages. *Elliot v. Van Buren*, 33 Mich. 49.

## Art. 9. Damages.

Where a person pays an admission fee to a dancing hall for the purpose of dancing with the class, he cannot be turned out except for cause, and in an action for illegal ejection he is not limited to the price paid for admission, but may be compensated for the indignity and disgrace of public expulsion. *Smith v. Leo*, 92 Hun, 242, 72 St. Rep. 314, 36 N. Y. Supp. 949.

In an action for assault and battery, the plaintiff may recover for the pain and suffering, both mental and physical, although no mental pain was alleged in the complaint, because such mental pain is not understood to include anything more than that which accompanies physical suffering. *Caldwell v. Central Park, etc., Co.*, 7 Misc. Rep. 67, 27 N. Y. Supp. 397, 57 St. Rep. 489.

Where a parent sues for assault and battery upon his son, the jury cannot give damages for the parent's wounded feelings. *Cowdin v. Wright*, 24 Wend. 429.

Where an action is brought by a married woman, she cannot recover for money expended by her husband for medical attendance. *Burnham v. Webster*, 3 St. Rep. 530, 25 Week. Dig. 556.

In an action for assault and battery, it was held as a general principle that in cases other than those upon contracts it is strictly within the province of the jury to estimate the loss suffered, and the courts will not interfere unless there is manifest abuse of the same as to show that the jury were affected by passion, prejudice, or some undue influence. *Peck v. N. Y. C. & H. R. R. R. Co.*, 4 Hun, 236, 6 T. & C. 436.

A new trial was ordered in an action for assault and battery where the court charged that the jury might allow the plaintiff for loss of time consequent upon the assault, where there was no evidence in the case of what his time was worth. *Kane v. Manhattan R. R. Co.*, 3 St. Rep. 145, citing *Leeds v. Metropolitan Gas Co.*, 90 N. Y. 26.

Where an action for assault and battery has been brought against defendants jointly, and the jury, in its verdict, awards a specific amount against one of the defendants and a nominal amount against the other, the plaintiff has two courses: (1) He may enter a *nolle prosequi* as to the one defendant, and enter judgment against the other for the damages assessed; or (2) he may enter judgment against both defendants for the largest damage found against either and remit the lesser damage. *Hoffman v. Schwartz*, 11 Civ. Proc. 200.



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Where a passenger is removed from a train for not procuring a ticket at the office, because of the absence of the agent, and subsequently refuses to pay the additional fare of five cents, an action lies for assault and battery, but the damages can only be compensatory. Where the damage occurred in the daytime, and in the presence of acquaintances, and he was removed from the car and put down on the road, a verdict of \$500 is not excessive. *Monnier v. N. Y. C. & H. R. R. Co.*, 70 App. Div. 405, 75 N. Y. Supp. 521, reversed 175 N. Y. 281.

Even though the plaintiff does not prove his actual loss in money while he is disabled by the assault, yet if he proves loss of time, he is entitled to at least nominal damages. *Niendorff v. Manhattan Ry. Co.*, 4 App. Div. 51, 74 St. Rep. 119, 38 N. Y. Supp. 690, citing *Leeds v. Metropolitan Gas Co.*, 90 N. Y. 26; *Feeney v. L. I. R. R. Co.*, 116 N. Y. 375; *Baker v. Manhattan Ry. Co.*, 118 N. Y. 533.

Where it is desired to recover special damages, such damages must be particularly stated in the complaint, or the plaintiff cannot give evidence of it upon trial. *Stevens v. Rodger*, 25 Hun, 54.

**SUBDIVISION 2.****Punitive Damages.**

Where the defendant's act in assault and battery is malicious, the jury may give exemplary damages. It is competent for the jury to find that the defendant's act was wanton, reckless, and malicious, and to award more than compensatory damages. *Conners v. Walsh*, 131 N. Y. 590, 42 St. Rep. 868, affirming 40 St. Rep. 984, 15 N. Y. Supp. 970.

Where the assault and battery is unprovoked, malicious, and wantonly committed, punitive damages may be awarded. *Clayton v. Keeler*, 18 Misc. Rep. 488, 42 N. Y. Supp. 1051.

In the absence of evidence of malice or ill-will on the part of the defendant, the plaintiff is not entitled to punitive damages, and where such damages are given and appear to be excessive, and the result of perverted judgment, it is the duty of the court to interfere. *Doran v. Brooklyn & New York Ferry Co.*, 46 St. Rep. 310, 19 N. Y. Supp. 172, citing *Newman v. N. Y., L. E. & W. R. R. Co.*, 54 Hun, 335, 27 St. Rep. 135, 7 N. Y. Supp. 560.

Exemplary damages cannot be allowed in a case where there has been no intentional offense by the defendant, but where he

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only did what he honestly believed to be his duty. *Hamilton v. Third Ave. R. R. Co.*, 53 N. Y. 25, reversing 35 N. Y. Super. (J. & S.) 118.

Where there is no malice shown, the plaintiff is merely entitled to compensation for the pain and suffering and loss of time occasioned by the assault, and is not entitled to punitive damages even where excessive force has been employed in removing plaintiff from a car. *Peck v. N. Y. C. & H. R. R. Co.*, 4 Hun, 238, 6 N. Y. Super. (J. & S.) 436. In this case it was held that a verdict for an amount which would not have been given against a natural person under the circumstances will satisfy the appellate court that the minds of the jury were unduly influenced by some extraneous and unknown influence, or by passion or prejudice against the defendant, and the verdict will not be allowed to stand.

Where the act of defendant, in removing a passenger from the car, is not accompanied by malicious or willful misconduct, or with intent to injure the plaintiff, the master is not liable for punitive damages. *Parker v. Long Island R. R. Co.*, 13 Hun, 320, citing *Hamilton v. Third Ave. R. R. Co.*, 53 N. Y. 30.

A master is not liable in punitive damages for the act of his servant if the servant would not have been liable for such damages at the suit of the master himself. *Townsend v. N. Y. C. & H. R. R. Co.*, 56 N. Y. 295, citing *Hamilton v. Third Ave. R. R. Co.*, 53 N. Y. 25.

Where it appears in an action for assault and battery that the plaintiff was a trespasser upon the premises of defendant, and the latter in removing him used more force than was necessary, the plaintiff is not entitled to punitive damages. This decision is founded upon the theory that one who exercises a legal right cannot be made liable because his action was instigated by wantonness or malice, for the exercise of the right cannot be affected by the motive that controls it. Therefore, as defendant had a right to remove the plaintiff, who was a trespasser, he is not liable in punitive damages. *Kiff v. Youmans*, 86 N. Y. 324, reversing 20 Hun, 123.

In an action by a married woman for assault for the purpose of rape, the jury may award exemplary damages. *Haulish v. Boller*. 72 App. Div. 559.

In an action for indecent assault, the jury, upon the question

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of damages, may consider the intent of the defendant as shown by his acts and language. *Hogg v. Kiersted*, 17 Week. Dig. 206.

Where the assault and battery is accompanied with indecent assault, it is an aggravated case, which calls for punitive damages, and the plaintiff's suffering in mind by reason of the shock to her moral sensibilities is a fit subject for consideration by the jury. *Ford v. Jones*, 62 Barb. 484.

Where a parent brings an action for assault and battery upon his daughter, his damages are measured by his actual loss through loss of her services; or, if sickness follow, for the expense attending the same. But he cannot recover beyond such actual loss, and exemplary damages cannot be given, even though the assault be of an indecent character. The person assaulted is the only one who can recover exemplary damages. The action of assault differs in this respect from the action of seduction, which is peculiar to itself. *Whitney v. Hitchcock*, 4 Den. 461.

To constitute malice it is not necessary that the act should come from hatred or ill-will, but malice may be inferred from the intent, or inexcusable recklessness. Thus, where the defendant wantonly persisted in shooting at the plaintiff with a sharp-pointed instrument, although warned to desist, and where the dart finally lodged in the plaintiff's eye, it was held to be malicious, and so rendered defendant liable to exemplary damages. *Etchberry v. Levielle*, 2 Hilt. 40.

The jury may give punitive damages where the injury is forceful and malicious. Even though the complaint does not in its terms allege that the assault was done with malice, yet if it allege facts from which malice may be inferred, evidence of such circumstances tending to prove malice are competent. *Elfers v. Woolley*, 116 N. Y. 294.

Insulting words spoken by the defendant may be shown to show malicious and evil intent on the part of defendant, and in order to enable the jury to fix the damages. *Delmage v. Crow*, 22 Misc. Rep. 511, 49 N. Y. Supp. 1004, 83 St. Rep. 1004.

When the verdict of the jury in assault and battery is not so large as to indicate passion, corruption, or prejudice, it should not be set aside; and note that this decision was an action where the plaintiff was not actually struck, but merely threatened with a dangerous weapon. *Liebstadter v. Federgreen*, 80 Hun, 245, 29 N. Y. Supp. 1039.

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It has been held that if an assault has not been found to be malicious by the jury, exemplary damage should not be allowed. *Williams v. Garrett*, 12 How. Pr. 456.

Where the evidence showed an aggravated assault, the court will not interfere with a verdict which gives punitive damages. So also in a case where the most serious part of the assault was committed by the defendant's servant at his order. *Smith v. Flannery*, 53 St. Rep. 159, 23 N. Y. Supp. 201.

The amount of damages is a question for the jury on all the evidence, and a verdict of \$100 for the plaintiff, who only received a black eye, will not be disturbed by the court. *Dunlap v. Ross*, 43 St. Rep. 509, 18 N. Y. Supp. 48.

A verdict against a railroad company for \$5,000 for an assault upon the plaintiff by a servant of the defendant, who attempted to kick the plaintiff, resulting in a swelling of the groin, whereby the plaintiff was obliged to go to a hospital, was held not to be excessive. *Niendorff v. Manhattan R. R. Co.*, 4 App. Div. 46, 38 N. Y. Supp. 690.

A verdict of \$5,000 was held to be excessive, even as punitive damages, in a case where the plaintiff provoked the assault by taunting and irritating the defendant when the latter was intoxicated and excited by drink. *Roades v. Larson*, 50 St. Rep. 551, 21 N. Y. Supp. 855, 66 Hun, 635.

For a case where the verdict was set aside as excessive, see *Roades v. Larson*, 50 St. Rep. 551, 66 Hun, 635, 21 N. Y. Supp. 855.

**SUBDIVISION 3.**

**Mitigation of Damages.**

In *Genung v. Baldwin*, 77 App. Div. 584, 79 N. Y. Supp. 569, 113 St. Rep. 569, reversing 75 App. Div. 195, it was held that provocation for the assault may be considered by the jury for the mitigation not only of punitive damages, but also of compensatory damages. The decision is founded on *Kiff v. Youmans*, 86 N. Y. 324, where it was said by Danforth, J.: "It still remains that the plaintiff provoked the trespass; was himself guilty of the act which led to the disturbance of the public peace. Although this provocation fails to justify the defendant \* \* \* it may be relied upon by him in mitigation, even of compensatory damages. This doctrine is as old as the action of trespass." But compare *Voltz v. Blackmar*, 64 N. Y. 444; *Linde v. Elias*, 4 Alb. L. J. 76.

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Facts constituting provocation or excuse for the assault may be shown in mitigation of exemplary damages. *Saltus v. Kip*, 12 How. Pr. 342.

The belief of the defendant as to his danger at the time of the assault may be shown in mitigation of exemplary damages, unless the plaintiff claims only compensatory damages. *Hogan v. Ryan*, 5 St. Rep. 110, citing *Yates v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 100; Whart. Crim. Ev., § 459.

In this case the court said "upon the question of exemplary damages he (the defendant) was entitled to have his conduct construed in the light of the danger in which he was apparently placed, and especially so when the plaintiff's conduct apparently increased his danger."

The damages sustained by the plaintiff cannot be mitigated by evidence that she was dissolute in her character. Such a woman is entitled to the same measure of damages for the trespass as she would have been if she sustained a good character for virtue. *Corning v. Corning*, 6 N. Y. 104.

But, in an action for assault and battery, which is aggravated by *indecent assault*, the plaintiff's character for chastity is directly in issue upon the question of damages, because her mental suffering will be greater in the event of her being chaste than otherwise, and specific acts of lewdness and immorality may be shown to attack her character. *Ford v. Jones*, 62 Barb. 484.

Mere physical possession of premises by a person is not sufficient to justify him in using force and violence either to prevent the lawful entry of the occupant, or one who has entered, and eject him therefrom. *Liebstadter v. Federgreen*, 80 Hun, 246, 61 St. Rep. 621, 29 N. Y. Supp. 1039.

A series of continued and repeated insults on the part of the plaintiff may be shown as provocation, and in mitigation of damages. The question is not how many hours elapsed since the provocation has been given, but whether in view of the circumstances of the case the party has had reasonable time to cool his blood. So that if the plaintiff, by series of irritating and annoying provocations, keeps the defendant in an excited state of mind, such fact may be shown. Each case should be controlled by its own peculiar circumstances. *Dolan v. Fagan*, 63 Barb. 73.

But the provocation which is admissible in mitigation of damages must be so recent and immediate as to induce a presumption

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that the violence was done under the immediate influence of the feelings and passions excited by it. Acts of the plaintiff done at a different time, or so antecedent as not to be fairly considered as part of the same transaction are not admissible in mitigation of damages, no matter how irritating the provocation. *Lee v. Woolsey*, 19 Johns. 318. See also *Beardsley v. Maynard*, 4 Wend. 336; *Maynard v. Beardsley*, 7 Wend. 560.

Insulting and provocative words cannot be considered by the jury in assessing damages, if they were used so long before the assault that there has been time for reflection, and for the passions to cool. But if such insulting words are simultaneous with the assault, they may be considered in mitigation, and the jury may be warranted in giving summary, and, perhaps, nominal damages. *Ellsworth v. Thompson*, 13 Wend. 662.

It seems that the fact of the defendant being tried in a criminal action for the same assault and battery cannot be given in evidence to mitigate damages in a civil action. *Cook v. Ellis*, 6 Hill, 466.

For a discussion of what may be shown in aggravation of damages by the plaintiff, and what may be shown by the defendant in mitigation thereof, see *Volz v. Blackmar*, 64 N. Y. 443.

## CHAPTER XIII

### MALICIOUS PROSECUTION.

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#### ARTICLE I.

##### DEFINITIONS AND DISTINCTIONS.

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##### SUBDIVISION 1.

###### Definitions; Distinguished from False Imprisonment.

By Code of Civil Procedure, subdivision 9 of section 3343, malicious prosecution is included in the term "personal injuries."

Pollock, p. 7, placing malicious prosecution among personal wrongs, makes a subdivision of the subject, which he classes "Wrongs, Affecting the Estate Generally," under which malicious prosecution is placed. This arises from a double classification adopted by this author under which he characterizes the wrongs grouped under personal wrongs as being, generally speaking, "willful or wanton," saying that as to acts of this character, they are either intended to do harm, or being evidently likely to cause harm are done with reckless indifference of what may befall by reason of it. It is, however, difficult to see how an action for malicious prosecution can be regarded as a "personal wrong," and still be classed as a wrong "affecting the estate generally," since it does

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not affect the estate in any way other than do all personal injuries. This is not a practical question in view of the provision of the Code.

Newell on Malicious Prosecution, p. 6, defines this action as a judicial proceeding, instituted by one person against another from wrongful or improper motives, and without cause to sustain it. On p. 22 he analyzes the subject by defining rights of persons to institute civil suits, or criminal prosecution to be:

(1) In criminal matters every person, being interested in the public order, has the right by law, upon probable cause, to make a complaint against an offender.

(2) In civil matters every person believing himself to have a claim against another, having probable cause for such belief, has a right by law to sue therefor; subject only, if his claim be adjudged false, to pay the costs of suit.

(3) In bankruptcy matters any person, being a creditor or having probable cause to believe himself such, may institute proceedings against his debtor if he have probable cause to believe that his debtor has committed an act of bankruptcy."

Citing, as to the latter subdivision, *Stewart v. Sonneborn*, 98 U. S. 187.

Cooley classes malicious prosecution among the torts affecting personal security. It is the lawful right of every man who believes he has a just demand against another to institute suit in an endeavor to obtain proper redress. It is the lawful right of every man to institute and set on foot criminal proceedings whenever he believes a public offense has been committed. In both these cases it would be impolitic and unjust to make the mere failure of a prosecution an actionable wrong. "Nevertheless it is a duty which every man owes to every other not to institute proceedings maliciously, which he has no good reason to believe are justified by the facts. Therefore an action will lie where there is a concurrence of the following circumstances: (1) Suit or proceeding has been instituted without probable cause therefor. (2) The motive in instituting it was malicious. (3) The prosecution has terminated in the acquittal or discharge of the accused." (2d ed.) 207.

"Malicious prosecution consists in the malicious institution against another of an unsuccessful criminal or bankruptcy or liquidation proceedings, without reasonable or probable cause." Underhill on Torts (7th ed.), 162.



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This action lies against any one who maliciously and without probable cause prosecutes another, whereby the party prosecuted sustains injury either in person, property, or reputation. *Burhans v. Sanford*, 19 Wend. 417.

There seems to be a distinction between an action for malicious prosecution and an action for abuse of process which is "essentially an action for an abuse of the process of the law, in order illegally, and wrongfully, by that means, to compel plaintiff to surrender up his property and rights to the defendant. In such a case it is unnecessary to allege or prove the termination of the prosecution." *Bebinger v. Sweet*, 1 Abb. N. C. 263, citing 2 Greenl. Ev. 452; *Grainger v. Hill*, 4 Bing. (N. C.) 212.

In *Kline v. Hibberd*, 80 Hun, 54, 61 St. Rep. 321, 29 N. Y. Supp. 807, the court says: "There is a distinction between malicious prosecution and malicious abuse of legal process. The abuse of legal process is where a party employs it for some unlawful object, and not to effect the purpose for which it was intended by law." (See Art. XI, this chapter.)

Ringwood on Law of Torts (3d ed.), p. 46, distinguished malicious prosecution from false imprisonment as follows: "There is one well-recognized distinction between an action for false imprisonment and an action for malicious prosecution, namely, that in the former the onus lies upon the defendant to plead and prove affirmatively the existence of reasonable cause as his justification, whereas in an action for malicious prosecution the plaintiff must allege and prove affirmatively its nonexistence." Citing *Hicks v. Faulkner*, 8 Q. B. D. 167.

In *Johnson v. Girdwood*, 7 Misc. Rep. 652, 58 St. Rep. 338, 28 N. Y. Supp. 151, the complaint, in effect, alleged that the defendant by fraud, duress, and conspiracy maliciously procured the arrest, conviction, and imprisonment of plaintiff for a crime of which he was innocent, and of which the defendant knew him to be innocent, to the grievous injury to his person, property, and reputation. Defendant demurred to the complaint. The court said, that as an action for false imprisonment the complaint could not stand for a moment, for it appeared that the prosecution and conviction of the plaintiff were upon lawful process. The action of false imprisonment is for the defendant having done that which, upon the stating of it, is manifestly *illegal*, while malicious prosecution is for a transaction which, upon the stating of it, is manifestly

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legal. The court says that under our system of procedure the right to recover depends not upon the name given to an action, or its classification, but whether on the facts represented he is entitled to any redress. "That is, all suits are special actions on the case, and if the facts show a right to relief the plaintiff will not be turned out of court because of a technical error in scientific nomenclature." And the court further said: "Nor is it an answer to an action that the like was never heard of before. It is the peculiar merit of the common law that its principles are so flexible and expansive as to comprehend any new wrong that may be developed by the inexhaustible resources of human depravity."

The distinction between false imprisonment and malicious prosecution is thus stated in *Warren v. Dennett*, 17 Misc. Rep. 86, 39 N. Y. Supp. 830: "In \* \* \* false imprisonment the plaintiff must show that the defendant had him imprisoned or deprived of his liberty and that the mode or process was unlawful, *i. e.*, without due process of law. \* \* \* In an action for malicious prosecution the plaintiff must prove that the process was regular and the arrest under it lawful, or by lawful authority acting for itself, and must also prove a want of probable cause and that the same was malicious. Here malice is not presumed as in the action for false imprisonment, but must be proven."

The distinction between malicious prosecution and false imprisonment is thus stated by Barnard, P. J., in *Neil v. Thorn*, 17 Hun, 145: "Upon this state of facts the court erred in charging the jury that if the plaintiff had an action for malicious prosecution, he had one for false imprisonment also. There is no similarity between the actions. One lies for an illegal arrest; the other when the arrest was legal in form and was made under due legal process from a court of competent jurisdiction, but when the complaint is made without probable cause and maliciously. One is based upon the right to immunity from arrest, except for good cause and by proper authority; the other is based upon a malicious abuse of the forms of law to injure another. The actions differed on different principles and require different proof to sustain them."

The distinction between malicious prosecution and false imprisonment is brought out by the fact that "even malicious motives and the absence of probable cause do not give a party

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Art. 1. Definitions and Distinctions.

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arrested an action for false imprisonment. They may aggravate his damage, but have nothing to do with the cause of action." *Marks v. Townsend*, 97 N. Y. 597.

The action of malicious prosecution and false imprisonment are consistent with each other and one is not destructive of the other. *Marks v. Townsend*, 97 N. Y. 594.

"A person may become liable to an action for false imprisonment by setting a municipal officer, such as a police constable, in motion. But by setting a judicial officer in motion he may render himself liable for an action of malicious prosecution, and consequently in an action for false imprisonment damages cannot be recovered for a remand ordered by a magistrate, this being the act of a judicial officer."

See further "False Imprisonment."

**SUBDIVISION 2.****Historical — Theory of the Action.**

In the note of the reporter in *Burlingame v. Burlingame*, 8 Cow. at p. 144, there is a short history of the action of malicious prosecution, with a citation of English authorities, the substance of which is as follows: Although the law naturally inclines to favor those who exert themselves to give effect to its criminal provisions, it will not allow its forms to be made the engine of oppressing the innocent without giving them an opportunity for redress. And, therefore, to restrain the savage spirit with which appeals were anciently prosecuted, the 13 Edw. I, chap. 12, directed, that if the appellee were acquitted, the appellor should suffer a year's imprisonment and pay a fine to the king, besides the satisfaction to the party whose life he, by the prosecution, attempted to destroy; and if the appellor were incapable of paying it, his abettors should be liable to do it for him, and to suffer imprisonment in their own persons. 4 Bl. Comm. 316; 3 Bl. Comm. 126, notes.

The ancient remedy, for the malicious prosecution of an indictment, was either a writ of conspiracy or an action on the case in the nature of a conspiracy, or an indictment, when several parties united in the evil design. The annotator states that at the present day the latter proceeding is sometimes resorted to where the circumstances are of a very dark coloring. But an action on the case for malicious prosecution is now the more usual, as it is the easier and more effectual remedy. Over the

## Art. 1. Definitions and Distinctions.

old writ of conspiracy it has great advantages; for the latter could only be brought where the life of the plaintiff had been in danger. The modern remedy of action on the case lies wherever there has been a malicious prosecution of any criminal charge without probable cause, and which has occasioned any damage to the person, character, or property of the plaintiff. In an action for malicious prosecution, the damage sustained by the plaintiff is the ground of the proceeding, and not any secret motives by which the guilt of the defendant may be increased.

But though actions for malicious prosecution are thus allowed they are by no means encouraged by the courts. In order to support them there must have been want of probable cause for the prosecution — malice express or implied — and an injury sustained by the plaintiff, either in his person by imprisonment, his reputation by scandal, or his property by expense. Citing 2 Selw. N. P. 1056, 1057.

Speaking of private wrongs Blackstone says: "A third way of destroying or injuring a man's reputation is by preferring malicious indictment or prosecution against him which, under the mask of justice and public spirit, are sometimes made the engines of private spite and enmity. For this, however, the law has given a very adequate remedy in damages, either by the action of conspiracy, which cannot be brought but against two at the least, or, which is the more usual way, by a special action on the case for the false and malicious prosecution. 3 Bl. Comm. 126.

A prosecution which, in the beginning, was without malice, or sufficient grounds for an action, may become malicious if the prosecutor, having acquired positive knowledge of the innocence of the accused, proceeds *malo animo* in the prosecution. *Fitz John v. McKinder*, 30 L. J. C. P. 264.

See the statements of Dykman, J., in *Wanser v. Wyckoff*, 9 Hun, 178, for statement of the theory upon which malicious prosecution is founded. Briefly, it has been found by experience that the law was sometime used as an engine of oppression, by setting on foot malicious prosecution against persons for the gratification of private spite and enmity, under the guise of justice and public spirit, and this action was provided to redress that wrong. The action, however, is not to be encouraged, but, on the contrary, is very much guarded; for it is the policy of the law that men must be left reasonably free to institute criminal prosecutions

## Art. 2. Remedies.

whenever they have tolerable grounds of suspicion, and that they must not be held liable to respond in damages in all cases where the prosecution miscarries.

The court, in *Kutner v. Fargo*, 20 Misc. Rep. 207, 79 St. Rep. 752, 45 N. Y. Supp. 752, said: "Actions for malicious prosecution are not favored in the law, and more than usual care must be exercised at the trial or injustice will be done to the defendant."

An action lies for conspiracy to use legal proceedings to injure another if they be in fact instituted pursuant to the conspiracy and the plaintiff suffer damage therefrom. *Verplanck v. Van Buren*, 76 N. Y. 247.

## ARTICLE II.

## REMEDIES.

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## SUBDIVISION 1.

## No Criminal Action.

There is no criminal aspect to malicious prosecution as in most personal wrongs. The wrong may be associated with a crime, as, for example, with perjury; but there is no criminal action for the prosecution as such.

One who maliciously, or without probable cause, prosecutes an action in Special Sessions may be personally charged with the costs in that action. See Code Crim. Proc., §§ 719, 720.

## SUBDIVISION 2.

## The Civil Action.

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§ 1. **Jurisdiction.**—A justice of the peace has no jurisdiction of an action for malicious prosecution. Code, § 2863, subd. 3.

As to the jurisdiction of the New York Municipal Court and The City Courts of Troy and Albany, see §§ 3215, 3223.

Where a complaint set out an action for malicious prosecution, together with an allegation that the plaintiff had executed a re-

## Art. 3. Elements of the Wrong.

lease thereof under threats and duress, and the relief demanded was that the release be canceled and for damages for the malicious prosecution, and where the case was tried at Special Term without either party objecting or making a demand for a jury trial, it was held that it was a proper case for trial at Special Term; that the equitable relief was an indispensable condition as to the existence of the legal right of action; that the plaintiff, having proceeded to trial without objection, or request for the intervention of a jury, could not complain of the tribunal to whose jurisdiction he had submitted. *Stono v. Weiller*, 128 N. Y. 655, 40 St. Rep. 434, affirming 32 St. Rep. 936, 10 N. Y. Supp. 828.

§ 2. **Statute of limitations.**— The statute of limitations is two years in actions of malicious prosecution. Code Civ. Proc., § 384.

§ 3. **Survival and assignment.**— By section 1910, subdivision 1, of the Code of Civil Procedure, an action for personal injury is a demand or claim not assignable, and an action for malicious prosecution is included among personal injuries by section 3343, subdivision 9, of the Code.

An action for malicious prosecution is not assignable. *Lawrence v. Martin*, 22 Cal. 173; *Noonan v. Orton*, 34 Wis. 359.

It does not survive the death of the injured party. *Littleton v. Dinehart*, 5 Cush. 543.

## ARTICLE III.

## ELEMENTS OF THE WRONG.

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## SUBDIVISION 1.

## General Statement.

In order to sustain an action for malicious prosecution, five elements must coexist: (1) Prosecution of the plaintiff by the

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defendant; (2) want of reasonable and probable cause for that prosecution; (3) malice, express or implied; (4) the determination of the prosecution in favor of the party prosecuted; and (5) loss or damage to that party by the prosecution. If any of these five elements are absent, no action will lie. Underhill on Torts (7th ed.), 162.

"A plaintiff, to succeed in an action for malicious prosecution, must prove three things: (1) That the proceedings terminated in his favor, if, from their nature, they were capable of such termination; (2) absence of reasonable or probable cause; and (3) malice." Ringwood on Torts (3d ed.), p. 46.

The necessary elements in malicious prosecution was thus stated by Mullin, J., in *Laird v. Taylor*, 66 Barb. 142: "To entitle the plaintiff to recover in this action, he must establish four particulars: (1) That he was prosecuted by defendant; (2) that such prosecution had been terminated in his (plaintiff's) favor; (3) that it was malicious; (4) that it was without probable cause."

In *Kline v. Hibberd*, 80 Hun, 54, 61 St. Rep. 321, 29 N. Y. Supp. 807: "To sustain an action for malicious prosecution, it is necessary that three elements shall occur in the prosecution complained of: (1) The proceeding must have been instituted without probable cause; (2) there must have been malice in instituting it; (3) it must have been completely terminated."

### SUBDIVISION 2.

#### Criminal and Civil Prosecution.

Where no judicial proceeding has been begun, an essential element to the action of malicious prosecution is wanting. So held where a passenger on a street car was, on the instance of a conductor, illegally arrested by a policeman without a warrant, was taken before a police justice, and, no complaint being made, was discharged. It seems that the proper remedy in such a case is false imprisonment. *Barry v. Third Ave. R. R. Co.*, 51 App. Div. 385, 98 St. Rep. 615, 64 N. Y. Supp. 615, citing *Brown v. Chadsey*, 39 Barb. 253; *Murphy v. Martin*, 58 Wis. 276; Cooley on Torts (2d ed.), 195-208.

Malicious prosecution will not lie for the mere issuing a warrant of arrest without causing the service of it. *Lawyer v. Loomis*, 3 T. & C. 393.

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Art. 3. Elements of the Wrong.

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Procuring a search warrant has been held to be the institution of a prosecution. *Casey v. Sheets*, 67 Ind. 375. So, too, the filing of an affidavit as the beginning of bastardy proceeding. *Coffee v. Meyers*, 84 Ind. 105. Or the taking out of a peace warrant. *Hyde v. Greuch*, 62 Md. 577.

By Penal Code, § 159, a person who maliciously and without probable cause procures a search warrant to be issued and executed is guilty of a misdemeanor. To same effect, see Code Crim. Proc., § 811. See also 1 R. S. 92, § 11, known as the Bill of Rights, asserting the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, and that no warrant can issue but upon probable cause, supported by oath or affirmation, etc.

Where one makes a false and malicious charge against another, and by means thereof procures an indictment and arrest, it is no defense in an action for malicious prosecution to show that the false charge did not allege facts constituting a crime charged in the indictment, or any other criminal offense. In this case the crime charged was forgery, and it was alleged and stated in the indictment to consist of an erasure of payment upon a bond. Plaintiff was indicted for forgery. The court held that these facts did not constitute forgery, and that, nevertheless, the defendant was liable for malicious prosecution. The court says: "I do not doubt if the defendant's statement to the district attorney and the grand jury had been true, and that an indictment had been found and prosecuted upon his truthful statement, that this action could not have been maintained. In such a case the defendant would not have been guilty of any wrong. The proof of the plaintiff would have been attributable to the erroneous legal conclusions of the district attorney and the grand jury. \* \* \*

There is no doubt that if the person truly states to a judge, and the judge thereupon does an act which the law will not justify, the party who made the statement is not liable, because in that case the grievance complained of arises, not from the false statement of the party, but from a mistake of the judge. *Denis v. Ryan*, 65 N. Y. 385, affirming 63 Barb. 145, 5 Lans. 350.

Consent to a prosecution induced by fraud, duress, and conspiracy is no defense. *Johnson v. Girdwood*, 7 Misc. Rep. 652, 58 St. Rep. 338, 28 N. Y. Supp. 151.



## Art. 3. Elements of the Wrong.

The action also seems to lie where the civil suit has been begun maliciously and without probable cause by an arrest, or by an attachment of property. So, too, malicious prosecution lies for the instituting of proceedings to have a person declared insane and placed under guardianship. "Such proceedings are almost necessarily damaging beyond what a civil suit can well be; and, if unfounded and malicious, deserve more than a mere punishment in costs." Cooley on Torts (2d ed.), 219, citing *Lockenour v. Sides*, 57 Ind. 360.

The action has been held to lie for maliciously instituting successive suits without probable cause, returnable before a justice of the peace, and causing great trouble and expense to the plaintiff. *Pangburn v. Bull*, 1 Wend. 345.

In *Brounstein v. Wile*, 47 St. Rep. 788, 20 N. Y. Supp. 204, the prosecution complained of was an action for replevin, and it was claimed that, under the circumstances, it tended to injure the plaintiff's financial reputation. *Held*, that a nonsuit was error; that the question of probable cause and malice should have been submitted to the jury.

In *Brounstein v. Sahlein*, 65 Hun, 365, 48 St. Rep. 19, 20 N. Y. Supp. 213, it was held that an action for malicious prosecution would lie, founded upon an action of replevin, wherein the plaintiff's goods were taken by the sheriff on the ground of fraud, and where subsequently the replevin action was discontinued on terms permitting the plaintiff to enter judgment dismissing the complaint upon the merits. Citing *Pangburn v. Bull*, 1 Wend. 345; *Bump v. Betts*, 19 Wend. 421; *Dempsey v. Lepp*, 52 How. Pr. 11; *Lawton v. Greene*, 64 N. Y. 331; *Shaffer v. Loucks*, 58 Barb. 426; *Closson v. Staples*, 42 Vt. 209; 14 Am. & Eng. Encyc. 34. It was further held that the arrest and holding to bail are not indispensably necessary to the maintenance of the action for malicious prosecution.

Up to a comparatively recent date, despite the decision in *Pangburn v. Bull*, 1 Wend. 345, the serious question was presented as to whether an action for malicious prosecution would lie for the prosecution of a civil action maliciously and without reasonable or probable cause to the injury of a party. A writer in the *American Law Register*, in 1882, in reviewing the authorities, states that practically at that time but five cases in this country had

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recognized such right. The more recent authorities in this State, hereafter cited, set this question entirely at rest within this jurisdiction.

The question of malicious prosecution by civil action is discussed in the opinion at Special Term, in *Smith v. Smith*, 20 Hun, 559, note. In this case there was a demurrer to the complaint, which alleged the malicious filing of a *lis pendens*. Discussing the right of action for malicious civil suits, Lawrence, J., on the authority of *Closson v. Staples*, 42 Vt. 217, says: "The early English cases show very clearly that, before the statutes entitling defendant to costs existed, they had a remedy at common law for injuries sustained by reason of suits which were malicious and without probable cause. It would seem, however, from more recent decisions, that the present English rule, which restricts or limits the right of action for maliciously prosecuting civil suits without probable cause, stands mainly upon the ground that the costs which the statute provides that the successful defendant shall recover are an adequate compensation for the damages he sustains; but, under their rule, it does not appear that the right of action is restricted to those cases where the process is by attachment." "The principle of the common law, recognized by the English courts before the statutes, allowing costs to defendant, and which gave a remedy for injuries sustained, by reason of suits which were malicious and without probable cause, is and ought to be operative still, and we think it affords a remedy in all such cases where the taxation of costs is not an adequate compensation for the damage sustained. But where the damages sustained by the defendant, in defending a suit maliciously prosecuted, without reasonable or probable cause, exceed the costs obtained by him, he has, and of right should have, a remedy by action on the case."

But, on a subsequent appeal, where the cause of action set forth in the complaint was the malicious filing of a *lis pendens*, and where the complaint failed to show that such prosecution was ended, and also failed to show that it was malicious and without probable cause, a demurrer to the complaint was sustained. *Smith v. Smith*, 26 Hun, 573, Brady, J., dissenting.

The question as to whether malicious prosecution lies against a plaintiff who has been unsuccessful in a civil action again came up in *Ferguson v. Arnou*, 142 N. Y. 583. The court said: "A party

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who brings an action for malicious prosecution against a plaintiff who has been unsuccessful in a civil action should not be permitted to recover without very clear and satisfactory proof of all the fundamental facts constituting his case. Such actions should not be encouraged. The costs awarded to a successful defendant in a civil action are the indemnity which the law gives him for a groundless prosecution. Public policy requires that parties may freely enter the courts to settle their grievances, and that they may do this without imminent exposure to a suit for damages in case of an adverse decision by judge or jury.

<sup>1</sup> In *Willard v. Holmes*, 2 Misc. Rep. 303, 51 St. Rep. 569, 21 N. Y. Supp. 998, it is said: "Liability, it seems, is predicable of the malicious prosecution, without probable cause of an ordinary civil action, and unquestionably so if the prosecution of the action be accompanied by the arrest of the person prosecuted, or the seizure and detention of his property." So stated in an action where the prosecution complained of was the attachment of plaintiff's property.

In *Willard v. Holmes et al.*, 142 N. Y. 495, 60 St. Rep. 89, the court said: "Whether such an action may be maintained regardless of whether the plaintiff in the former action had interfered with either the person or the property of the defendant therein, is a question we are not called upon to determine. The general rule at common law that an ordinary action maliciously brought and without probable cause, which had terminated in favor of the defendant, gave rise to a right of action, certainly seems to have disappeared in England with the enactment of statutes giving costs to successful defendants. (3 Bl. Comm. 126, Chitty's Notes; *Quartz Hill, etc., Co. v. Eyre*, L. R., 11 Q. B. Div. 674-683.) In this country the authorities are not agreed upon the doctrine governing such actions; as may be seen by reference to the cases collated in 14 Am. & Eng. Encyc. of Law, 32. But I am prepared to assume that there may be satisfactory authority for holding that where a party has been subjected to some special, or added, grievance, as by an interference with his person or property, in a civil action, brought without probable cause, he may maintain a subsequent action to recover any legal damage, which he avers and is able to show to have been occasioned to him."

In that case the plaintiff was arrested in an action of trespass,

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and under the facts the court reversed the judgment in favor of plaintiff, saying, "For the arrest the plaintiff had his indemnity in the undertaking given upon the granting of the order of arrest."

**SUBDIVISION 3.****Malice.**

In *Willard v. Holmes*, 2 Misc. Rep. 303, 51 St. Rep. 569, 21 N. Y. Supp. 998, malice is thus defined: "Malice in law comprehends not only, as in the ordinary meaning of the term, a malevolent intention to injure another in his person, property, or good repute, but also any wanton or reckless disregard of another's inviolable enjoyment of his civil rights."

Malice in malicious prosecution has been thus defined: "Any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice, is a malicious motive on the part of the person who acts in that way." *Stevens v. Midland County Ry. Co.*, 10 Exch. 352.

Malice was thus defined by Hawkins, J., in *Hicks v. Faulkner*, 8 Q. B. Div. 167: "The malice necessary to be established is not even malice in law, such as may be assumed from the intentional doing of the wrongful act; but malice in fact — *malo animus* — indicating that the party was actuated either by spite or ill-will toward the individual, or by direct and improper motives, though these may be wholly unconnected with any uncharitable feeling toward anybody."

The mere malicious assertion of a legal right is not actionable. No man can be sued for the exercise of his legal right to issue execution upon a judgment, though it be averred that he acted maliciously and without reasonable or probable cause. Addison on Torts, 751.

No degree of malice which may be shown will warrant the inference of lack of probable cause. If there was probable cause the action for malicious prosecution cannot be maintained, even though the prosecution was malicious. *Miller v. Milligan*, 48 Barb. 30.

A charge that if there was probable cause for the complaint, even though it was made from malicious motives, the verdict must be for the defendant, was held to be proper in *Fay v. O'Neill*, 36 N. Y. 14.

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Where the plaintiff had been found gathering chestnuts on the land of the defendant, and where the charge of petit larceny was proven against him,—*Held*, in an action for malicious prosecution, that a nonsuit was proper, and that the fact of the prosecution being instituted for purposes of revenge was immaterial. The court said: "If, as we have suggested, the facts and circumstances were such as to justify the defendant in believing that the plaintiff had been guilty of the crime charged against him, and they instituted the prosecution believing he had committed the crime of larceny, they are not liable in an action for malicious prosecution, even though one of the defendants may have been actuated by motives of revenge in instituting the prosecution." *Shipman v. Learn*, 92 Hun, 558, 72 St. Rep. 73, 36 N. Y. Supp. 969.

Malice may be inferred from want of probable cause. *Heyne v. Blair*, 62 N. Y. 21.

In *Bradner v. Faulkner*, 93 N. Y. 515, reversing 16 Week. Dig. 240, it was held that it was not necessary for the plaintiff in order to make out his case to show affirmatively actual malice upon the part of defendant, but he may, on proving *prima facie* acts or want of probable cause, rest and rely upon the presumption of malice, which the jury are authorized to make from the want of probable cause.

The jury may infer malice from want of probable cause, but are not bound to infer it. *Langley v. East River Gas Co.*, 41 App. Div. 470, 92 St. Rep. 992, 58 N. Y. Supp. 992.

Malice may be and usually is inferred in these actions from the want of probable cause; it is not necessary to show that the act complained of was dictated by angry feelings or vindictive motive. *Burhans v. Sanford & Brown*, 19 Wend. 417, cited with approval, *Hall v. Kehoe*, 28 St. Rep. 357, 8 N. Y. Supp. 176.

Where a person would not necessarily draw an inference of malice from the facts as proven against the defendant, it seems that it is a question for the jury. *Neil v. Thorn*, 17 Hun, 145.

Lack of probable cause is evidence sufficient to warrant the jury in finding malice. But it is merely evidence of malice, and is not conclusive, and although there is no probable cause the jury may nevertheless find for defendant upon the ground that there was no malice. *Brown v. McBride*, 24 Misc. Rep. 236, 86 St. Rep. 620. 52 N. Y. Supp. 620.

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Malice may be inferred from want of probable cause. Malice may be and usually is inferred from want of probable cause. Malice is \* \* \* a question exclusively for the jury. *Scott v. Dennett, etc., Co.*, 51 App. Div. 321-326, 64 N. Y. Supp. 1016.

Malice is not necessarily to be inferred from want of probable cause. Unless the proof showing want of probable cause also justifies the inference of malice the plaintiff must show malice by additional evidence. *Young v. Lyall*, 23 St. Rep. 215, 57 N. Y. Super. 39, 5 N. Y. Supp. 11.

Where there is sufficient proof of want of probable cause malice may be inferred, and the question as to whether the transaction was malicious or not should be submitted to the jury. *Grinnell v. Stewart*, 32 Barb. 544, 12 Abb. Pr. 220, 20 How. Pr. 478.

For a case where an assault upon the plaintiff by defendant, together with an interference with his duties as commissioner of highways, was held malicious, see *Howe v. Oldham*, 69 Hun, 57, 53 St. Rep. 327, 23 N. Y. Supp. 703.

Where the defendant had brought two actions against the plaintiff, its agent, one for replevin, in which it failed, and another for an accounting, in which it recovered judgment,—*Held*, that the latter judgment went much toward showing that there was no malice upon part of the defendant in bringing the action of replevin. *Sheahan v. National Steamship Co.*, 66 Hun, 48, 49 St. Rep. 484, 20 N. Y. Supp. 740.

In *Schwartz v. Van Wye N. Y. Grocery Co.*, 60 App. Div. 475, 103 St. Rep. 978, 69 N. Y. Supp. 978, the court considers the absence of probable cause as establishing malice, and seems to hold that while the finding of probable cause authorizes an inference of malice, it does not establish its existence beyond dispute. The court disapproves *Lawyer v. Loomis*, 3 T. & C. 393, where it was held that if the jury find no probable cause malice is established beyond dispute. The question before the court, however, is as to the admissibility of evidence by the defendant's president as to his motive in the prosecution, and the court expressly says that the reversal is based solely upon the error in excluding such testimony.

Proof that one of the defendants instructed the other falsely to charge the plaintiff with petit larceny by means of sworn information is sufficient to sustain a verdict. *George v. Johnson*, 25 App. Div. 125, 83 N. Y. Supp. 203, 49 N. Y. Supp. 203.

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Where the prosecution complained of was an action for libel brought in justices' court, which was without jurisdiction, and which was discontinued upon return day,—*Held*, that defendant was not liable for malicious prosecution unless it was shown that he knew the justices' court had no jurisdiction; the burden of showing this was on plaintiff. *Eldred v. Fadrey*, 16 St. Rep. 83.

By Penal Code, § 271, it is provided that whoever maliciously procures any process in a civil action to be served on Saturday, upon any person who keeps Saturday as a holy time, and does not labor on that day, or serves upon him any process returnable on that day, or maliciously procures any civil action to which such person is a party to be adjourned to that day for trial, is guilty of a misdemeanor.

There is some confusion in regard to the inference of malice from want of probable cause, and this is probably more due to the language used than from any other cause. If a person should bring an action without probable cause, there are only two possible reasons: (1) He may be actuated by malice, or (2) he may be negligent or careless in carefully considering the prosecution of the action before bringing it. Such negligence might not be equivalent to actual malicious motive, but in such cases the defendants, lacking reasonable cause, have been held liable for their negligence or carelessness, though it has been called inferential malice rather than by its true name.

Advice of counsel will not of itself protect a client from the imputation of malice. To have that effect the question must be one of law, or some legal principle must be involved in order to a proper decision of which the law applicable to the question must be ascertained. In such a case if the client acts in good faith upon the advice of counsel he cannot be charged with malice. *Laird v. Taylor*, 66 Barb. 142.

## SUBDIVISION 4.

## Want of Probable Cause.

Speaking of probable cause, Chief Justice Tyndale says: "There must be reasonable cause — such as would operate upon the mind of a discreet man. There must be probable cause, such as would operate upon the mind of a reasonable man."

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Good faith merely is not sufficient to protect the defendant in an action for malicious prosecution. There must have been reasonable grounds for the suspicion, supported by circumstances strong enough in themselves to warrant a cautious man in the belief of plaintiff's guilt. Belief and reasonable grounds for belief are both essential elements in probable cause. A man is responsible if he fails to call in to his aid reason, caution, and fairness. He must not act upon mere conjecture, or impulse, or passion. *Shafer v. Loucks*, 58 Barb. 426.

In an action brought to recover damages for the malicious prosecution by the defendant in a civil proceeding for contempt which resulted in an order, subsequently reversed on appeal, adjudging that the plaintiff was guilty of contempt and committing him to jail, the making of the order is not conclusive evidence of the existence of probable cause for instituting the contempt proceedings, where it appears that such order was obtained upon affidavits made by the defendant containing false statements, and that the defendant did not read the affidavit, or have it read to him, and signed it without knowing its contents. *Semble*, that the order obtained upon an affidavit thus recklessly made afforded no protection whatever to the defendant, and that malice was inferable from his act in signing the affidavit so made and allowing his attorney to use it to obtain the incarceration of the plaintiff. *Mesnier v. Denike*, 82 App. Div. 404.

Probable cause which will justify a criminal accusation is defined to be a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offense with which he is charged. It does not depend upon the guilt or innocence of the person accused, or upon the fact whether a crime has been committed. The person making the criminal accusation may act upon appearances, and if the apparent facts are such that a discreet and prudent person would be led to the belief that a crime has been committed by the person charged, he will be justified, although it turns out that he was not justified and that the party accused was innocent. But a groundless suspicion, unwarranted by the conduct of the accused, or by facts known to the accuser when the accusation is made, will not exempt the latter from liability to the innocent person for damages for causing the arrest. *Carl v. Ayres*, 53 N. Y. 17.



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If the defendant was in fact the prosecutor, his mere belief that the plaintiff was guilty does not constitute probable cause for the prosecution. There must not only be a real belief, but a reasonable ground for the belief in order to afford justification. But where the defendant is not the prosecutor in fact, but only constructively by reason of his having given false information which led to the arrest, the motive is immaterial; if the defendant acted in good faith it is a defense to the action. *Farnam v. Feeley*, 56 N. Y. 451.

Probable cause is a reasonable suspicion, supported by circumstances sufficient to warrant a cautious man in the belief that the person accused is guilty of the offense charged, and such cause will be a defense in an action for malicious prosecution, however innocent the plaintiff may be. But the facts inducing the suspicion must be known to the defendant, or he must have had information of them at the time of commencing the prosecution, or else they will not avail him. *Foshay v. Ferguson*, 2 Den. 617.

Good faith merely in making a criminal charge is not sufficient to protect a party from liability. There must have been reasonable ground of suspicion, supported by circumstances strong enough to warrant a cautious man in the belief that the person he charged was guilty. *Hall v. Suydam*, 6 Barb. 83.

Where the malicious prosecution complained of was a civil prosecution, probable cause may consist of such facts and circumstances as lead to the inference that the party so acting had an honest and reasonable conviction of the justice of the statement. *Besson v. Southard*, 10 N. Y. 239.

"The question of what constitutes probable cause does not depend upon whether the offense had been committed in fact, nor whether the accused is innocent or guilty, but upon the prosecutor's belief, based upon reasonable grounds. The prosecutor may act upon appearances, and if the apparent facts are such that a discreet and prudent person would be led to the belief that the accused had committed a crime, he will not be liable in this action, although it may turn out that the accused was innocent. If there is an honest belief of guilt, and there exist reasonable grounds for such belief, the party will be justified. But however suspicious the appearances may be from existing circumstances, if the prosecutor had knowledge of facts which will explain the suspicious appearances and exonerate the accused from a criminal

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charge, he cannot justify a prosecution by putting forth *prima facie* circumstances, and excluding those within his knowledge which tend to prove innocence." *Fagnan v. Knox*, 66 N. Y. 528, 1 Abb. N. C. 246, reversing 40 N. Y. Super. 41.

A mere honest belief in the plaintiff's guilt is not enough to show probable cause. The belief must be founded upon reasonable grounds. "For though he have belief, and yet act negligently and irrationally, the prosecutor may not have probable cause. The test, then, is not exclusively limited to the actual knowledge in fact of the defendant, but may be put to any knowledge which he could or ought to have gained in the exercise of ordinary prudence and caution. And if by such exercise a proper investigation might have cleared away suspicious circumstances, and yet was omitted, there may be evidence of no probable cause. *Scott v. Dennett, etc., Co.*, 51 App. Div. 323, 98 St. Rep. 1016, 64 N. Y. Supp. 1016.

Probable cause may be founded upon misinformation as to the facts, and not on a mistake as to the law. Therefore, where the defendant was advised by his counsel that certain acts of the plaintiff constituted larceny this does not form a basis for the finding of fact that he had probable cause to believe the plaintiff guilty, though such advice of counsel may bear on the question of malice. *Hazzard v. Flury*, 120 N. Y. 223, 30 St. Rep. 906.

The question of probable cause does not necessarily depend upon the guilt or innocence of the party accused, or upon the fact whether a crime has been committed. *Hazzard v. Flury*, 120 N. Y. 223, 30 St. Rep. 906.

Where the evidence is such that a reasonable man would take a person to be guilty of the theft which is shown to have been committed, and where the fruits of the crime are within the possession of the accused, and such possession is not explained by him when they were so found, nor for a considerable time thereafter, probable cause is established. *Molloy v. Long Island R. R. Co.*, 59 Hun, 424, 36 St. Rep. 626, 18 N. Y. Supp. 382.

The mere fact that the defendant had commenced two suits in a justice's court and had failed to appear on the return day, is not evidence of want of probable cause sufficient to sustain an action for malicious prosecution. Want of probable cause must be shown affirmatively, and is not to be inferred from mere neglect to prosecute a suit. *Gorton v. De Angelis*, 6 Wend. 418.

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A judgment in plaintiff's favor in a justice's court after trial on the merits is *prima facie* evidence of probable cause to defeat an action for malicious prosecution, even though upon appeal to the County Court it is reversed upon new trial. It is not, however, conclusive evidence, and may be impeached for fraud, conspiracy, perjury, or subornation. But where no evidence is offered to impeach such judgment, it is the duty of the court to order a nonsuit. *Palmer v. Avery*, 41 Barb. 290, affirmed 41 N. Y. 619.

Where the defendant has caused the plaintiff's arrest for maliciously tearing down a fence, and where the charge was decided in the plaintiff's favor, and where it was shown in the action for malicious prosecution that the parties were adjoining owners of real estate; that the defendant rebuilt the fence which had blown down, and that the plaintiff tore it down, etc.—*Held*, that the defendant had probable cause for the arrest. *Wrench v. Samenfelf*, 47 St. Rep. 378, 19 N. Y. Supp. 948.

If the defendant is convicted in the first instance and appeals, and is acquitted in the appellate court, the conviction below is conclusive of probable cause. *Cooley on Torts* (2d ed.), 214, citing *Whitney v. Peckham*, 15 Mass. 242; *Payson v. Cassell*, 22 Me. 212. Unless the conviction was procured by fraud. *Welch v. Boston, etc., R. R. Co.*, 14 R. I. 609.

Where the plaintiff was arrested by the police officer upon a charge made by the servant of a railroad company and was taken before a magistrate and convicted,—*Held*, that there could be no action for malicious prosecution because the plaintiff was found guilty of the charge. *Oppenheimer v. Manhattan Ry. Co.*, 45 St. Rep. 134, 18 N. Y. Supp. 411.

An acquittal is not *prima facie* evidence of want of probable cause. *Brounstein v. Sahlein*, 65 Hun, 365, 48 St. Rep. 19, 20 N. Y. Supp. 213, citing *Scott v. Simpson*, 1 Sandf. 601; nor is neglect to prosecute, citing *Gorton v. De Angelis*, 6 Wend. 418.

A recovery in a court of competent jurisdiction in favor of the plaintiff in the suit complained of as malicious is not conclusive evidence of probable cause. *Burt v. Place*, 4 Wend. 591.

Where a judgment of conviction by a justice of the peace is reversed by the County Court, and the accused discharged, such judgment of conviction is *prima facie* evidence of probable cause, but is not conclusive. Nor under such circumstances must the plaintiff necessarily show, in order to recover, fraud, conspiracy,

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or subornation in procuring the judgment. *Nicholson v. Sternberg*, 61 App. Div. 51, 104 St. Rep. 212, 70 N. Y. Supp. 212; *Burt v. Place*, 4 Wend. 593, cited and approved.

## SUBDIVISION 5.

## Want of Probable Cause; Must Concur with Malice.

The plaintiff must prove both want of probable cause and malice upon the part of defendant. The failure to prove either of these defeats the action. Proof of malice will not exclude or supply want of proof of want of probable cause. Neither can want of probable cause be inferred from proof of malice, although malice may be inferred from want of probable cause. *Heyne v. Blair*, 62 N. Y. 21.

To support the action want of probable cause and malice must concur. *Besson v. Southard*, 10 N. Y. 239.

It is fundamental in an action for malicious prosecution that the plaintiff prove both want of probable cause and malice. *Wright v. Terry*, 24 Hun, 228.

In an action for malicious prosecution the essential elements are want of probable cause and malice. This must be proved by the plaintiff affirmatively, and evidence must be introduced in regard to them from which they may be legitimately inferred. *McKown v. Hunter*, 30 N. Y. 627.

In an action for malicious prosecution, the plaintiff must show affirmatively want of probable cause for the prosecution, and that it was instituted with malice. And the plaintiff must give evidence of these facts before he rests, for the defendant cannot legally be called upon to enter on a defense until the plaintiff has established, first, want of reasonable and probable cause; and, second, that the complaint was instituted with malice. *Thaule v. Krekeler*, 81 N. Y. 428.

It is incumbent upon the plaintiff to prove that the prosecution was instituted maliciously and without probable cause. If the circumstances are such that they furnish reasonable ground of suspicion the plaintiff will be justified in acting upon such appearances. If they are such that a discreet and prudent person would be led to the belief that the accused had committed the crime it is sufficient, even though appearances be misleading and the person is in fact innocent. *Dunton v. Hagerman*, 18 App. Div.

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146, 80 St. Rep. 758, 46 N. Y. Supp. 758, citing *Fagnan v. Knox*, 66 N. Y. 525; *Anderson v. How*, 116 N. Y. 336.

No action lies for merely bringing suit against a person without sufficient grounds. To sustain a suit for a former prosecution it must appear to have been without cause and malicious. *Vanduzor v. Linderman*, 10 Johns. 106.

The complaint must allege and the plaintiff must show both malice and want of probable cause. *Miller v. Milligan*, 48 Barb. 30.

The want of probable cause is independent of malicious motives and cannot be inferred as a consequence from any degree of malice which may be shown. *Besson v. Southard*, 10 N. Y. 239.

## SUBDIVISION 6.

## Questions of Law and Fact.

"It is a rule of law that the jury must find the facts on which the question of reasonable and probable cause depends, and the judge is then to decide whether the facts so found constitute reasonable and probable cause. \* \* \* The third essential which the plaintiff in such an action \* \* \* has to prove, namely, malice on the part of the defendant; this is a question entirely for the consideration of the jury, as the question of reasonable and probable cause is one for the judge upon the facts found by them. *Ringwood Law of Torts* (3d ed.), 47-51.

Whether the plaintiff has established want of probable cause and malice is for the court to determine as a matter of law, after assuming that the plaintiff's evidence is true. *Thaule v. Krekeler*, 81 N. Y. 434.

Where there is no conflict in the evidence, or disputed facts, or any doubt of the inferences to be drawn therefrom, the question of probable cause is one of law for the court, and not of fact for the jury. *Heyne v. Blair*, 62 N. Y. 19, reversing 3 T. & C. 263.

Where the facts are undisputed and but one inference can be drawn from them, the question of probable cause is one of law. *Hazzard v. Flury*, 120 N. Y. 223, 30 St. Rep. 906.

Where there is no dispute as to the facts the question as to probable cause or want of probable cause is a question for the court and not for the jury. *Anderson v. How*, 116 N. Y. 338, 26 St. Rep. 787.

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In *Fagnan v. Knox*, 66 N. Y. 527, it is said: "The question of probable cause is a question of law and not of fact. It is sometimes said to be a mixed question of law and fact. This only means that when the facts adduced to prove want of probable cause are controverted, or conflicting evidence is to be weighed, or the credibility of witnesses is to be passed upon, it must be submitted to the jury to find the facts under proper instructions as to the law. It is true \* \* \* that if the facts which the plaintiff's evidence tends to prove, would not establish a want of probable cause, although there may be a conflict of evidence, it is the duty of the court to withdraw the question from the jury because a finding in favor of the plaintiffs would not avail him in law upon the point." See also *Palmer v. Palmer*, 8 App. Div. 331, 40 N. Y. Supp. 829.

The rule as to when the question of probable cause is for the court and when for the jury is discussed in *Kline v. Hibberd*, 80 Hun, 54, 61 St. Rep. 321, 29 N. Y. Supp. 807. "What facts and circumstances amount to probable cause is a pure question of law, but whether they exist or not may be a question of fact. If the facts are controverted, then the question of probable cause should be submitted to the jury with instructions from the court as to the law. But when the facts are undisputed or the plaintiff's evidence fails to show want of probable cause it becomes merely a question of law which the court must decide."

When there is no dispute as to the facts the question of probable cause is one for the court alone, and it is error to submit it to the jury. *Farrell v. Friedlander*, 63 Hun, 254, 18 N. Y. Supp. 215, 43 St. Rep. 445.

The question of probable cause is "composed of law and fact, it being the province of the jury to determine the circumstances alleged, whether true or not, and of the court to determine whether or not they amount to probable cause. But when the matter of fact and the matter of law of which the probable cause consists are so intimately blended together as not to be easily susceptible of an easy decision, the judge is warranted in leaving the question to the jury, instructing them in the principles of law in which they are to be governed in finding a verdict. \* \* \* Whether the circumstances alleged to show probable cause are true and exist is a matter of fact. But whether, supposing them to be true, they amount to probable cause is a question of law." It follows that

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where there is no dispute about material facts, and no conflict in evidence, no impeachment of witnesses, the judge should assume to himself the right to pronounce the legal effect of the evidence. *Besson v. Southard*, 10 N. Y. 239.

When the facts bearing on the existence of probable cause are not disputed, and admit of but one inference, the question of probable cause is for the court. But if the facts are disputed, or admit of opposing inferences, or if the facts and the law are so closely united and not easily susceptible of a separate decision, the question is for the jury. *Scott v. Dennett Surpassing Coffee Co.*, 51 App. Div. 321, 98 St. Rep. 1016, 64 N. Y. Supp. 1016; *Ericson v. Edison El. Il. Co.*, 59 App. Div. 612, 68 N. Y. Supp. 1044.

Where the evidence as to want of probable cause and malice is conflicting the questions are properly submitted to the jury. *Robbins v. Robbins*, 133 N. Y. 598, 28 Abb. N. C. 256, 44 St. Rep. 684, affirming 39 St. Rep. 453, 15 N. Y. Supp. 215.

Where the question of probable cause depended upon conflicting testimony, and where it was held a proper question for the jury, see *Hodges v. Richards*, 30 App. Div. 158, 85 St. Rep. 869, 51 N. Y. Supp. 869.

For a case where the evidence was so conflicting as to make the question of probable cause and malice proper for the jury, see *Hamilton v. Davey*, 28 App. Div. 457, 85 St. Rep. 88, 51 N. Y. Supp. 88.

On the question of probable cause the inquiry is not limited to facts within the prosecutor's knowledge, but information given him by others may be shown, and the question as to how far such information justifies the act of the defendant is a question for the jury, and is not a question of law. *Owens v. New Rochelle Coal & Lumber Co.*, 38 App. Div. 53, 89 St. Rep. 913, 55 N. Y. Supp. 913.

Where the facts are in dispute, or where, though undisputed, they would reasonably sustain different inferences as to the existence of probable cause, that question, as well as the question of malice, should be left to the jury, and it is error for the court to decide it as matter of law. *Collins v. Manning*, 32 St. Rep. 998, 10 N. Y. Supp. 658.

Where defendant had plaintiff arrested for having the body of his own child exhumed and extracted a bone for the purposes of evidence in a civil action,—*Held*, that the plaintiff did not violate

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the statute and that under the circumstances the question of probable cause and malice were properly left to the jury, and the verdict for the plaintiff would not be disturbed. *Rhodes v. Brandt*, 21 Hun, 1.

For a case where the question of probable cause was held to be a question for the jury, see *Sweet v. Smith*, 42 App. Div. 503, 93 St. Rep. 404, 59 N. Y. Supp. 404; *Costigan v. Metropolitan Life Ins. Co.*, 39 App. Div. 644, 57 N. Y. Supp. 177.

Where the plaintiff was arrested for assault and battery, and also on a charge of larceny,—*Held*, that the question as to whether he committed the assault was question for jury where the evidence is conflicting. *Collins v. Manning*, 1 St. Rep. 193.

Where the facts are not disputed the question as to whether there was probable cause for the prosecution is one of law for the court. *Shipman v. Learn*, 92 Hun, 558, 36 N. Y. Supp. 969, 72 St. Rep. 73.

For a case where, under the facts, the question of probable cause is held to be a question for the jury, see *Ericson v. Edison El. Co.*, 31 Misc. Rep. 379, 98 St. Rep. 498, 64 N. Y. Supp. 498.

**SUBDIVISION 7.****Former Prosecution Must Have Terminated in Plaintiff's Favor.**

The rule that in bringing an action for malicious prosecution the plaintiff is bound to show termination of the criminal proceeding has for its foundation that it cannot be known that the prosecution was unjust and unfounded except it is terminated. If the action for malicious prosecution were allowed to be maintained before the termination of the criminal proceeding the plaintiff might be found guilty of that proceeding and yet maintain the action for malicious prosecution on the ground that he was not guilty. Thus there might be two conflicting determinations as to the same transaction. It was also held that the criminal proceeding is terminated, even though the plaintiff when discharged is informed by the police justice that he is inclined to hold her to bail before he makes his final determination, though he finally discharges her upon being shown that she is friendless and unable to procure bail. *Robbins v. Robbins*, 133 N. Y. 598, 28 Abb. N. C. 256, 44 St. Rep. 684, affirming 39 St. Rep. 453, 15 N. Y. Supp. 215.



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For the purpose of termination of the former prosecution an abandonment of the charge and a discontinuance of the prosecution is equivalent to a discharge from the accusation. *Fay v. O'Neill*, 36 N. Y. 11, citing *Clark v. Cleveland*, 6 Hill, 344; *Secor v. Babcock*, 2 Johns. 203; *Burhans v. Sanford*, 19 Wend. 417.

Under an answer which admits the termination of the former prosecution it cannot be maintained that the justice who tried the case was without jurisdiction, where no such fact is alleged in the answer. *Siefke v. Siefke*, 6 App. Div. 472, 39 N. Y. Supp. 601.

For a case where the discharge of the plaintiff on *habeas corpus* was held not to be termination of the former proceeding, see *Vorce v. Oppenheim*, 37 App. Div. 69, 89 St. Rep. 596, 55 N. Y. Supp. 596.

Where the prosecution complained of was the arrest of the plaintiff for wrongfully cutting timber upon defendant's land, and where the case was adjourned to have an answer made, and on the adjourned day the complaint was dismissed on the complainant's motion and the plaintiff discharged,—*Held*, that the criminal proceeding was ended so as to permit action for malicious prosecution. *Hall v. Kehoe*, 28 St. Rep. 357, 8 N. Y. Supp. 176.

In sustaining a demurrer to a complaint the court, in *Thomason v. De Mott*, 18 How. Pr. 529, 9 Abb. Pr. 242, said: "It is essential that the complaint should show that the alleged malicious prosecution has been terminated by the plaintiff's acquittal, or in such a way that no further proceedings upon it can be had against him. Even a *nolle prosequi* entered with leave of the court would be a nullity, and the court cannot enter a *nolle prosequi* on its own motion." Therefore, it was held that an indorsement on an indictment by an assistant district attorney, stating that the case was frivolous and should never be tried, is not an end of the prosecution which will warrant an action for malicious prosecution, because there is no obstacle to bringing the plaintiff to trial upon the indictment.

The action cannot be brought until the proceeding complained of has been legally terminated in favor of the accused, and the fact that the plaintiff has been discharged from imprisonment on *habeas corpus*, and admitted to bail to await the action of the grand jury of a charge of larceny, and where the grand jury has not

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considered the case, the former proceeding is not terminated. In such case it is not competent to prove that no further proceedings were taken in the criminal case, after the commencement of the civil action, because the commencement of the civil action may have been itself instrumental in staying the criminal proceedings. Nor in a civil action and before termination of criminal proceedings will the court examine into the merits of the latter to ascertain the lack of foundation of the criminal charge. *Hinds v. Parker*, 11 App. Div. 329, 76 St. Rep. 955, 42 N. Y. Supp. 955, citing *Swartout v. Dickelman*, 12 Hun, 358.

An action will not lie for a malicious arrest upon a criminal charge before a magistrate, unless the proceeding is so far ended that nothing can be done by the prosecutor without commencing anew. But to maintain the action it is not necessary to show an acquittal, such as would bar second prosecution for the same offense, nor is it essential that any judicial decision upon the merits should have been made. *Clark v. Cleveland*, 6 Hill, 344.

The entry of a *nolle prosequi* with assent of defendant is a sufficient termination of prosecution to support the action. *Moulton v. Beecher*, 8 Hun, 100.

Where the proof offered of the termination of a prosecution was that a recognizance had been taken from the plaintiff, and the indorsement made thereon upon the evidence taken by the police magistrate was as follows: "Bail discharged April 20, 1843." Evidence that there was an entry to the same effect in the book of minutes kept by the clerk of the criminal court was held sufficient proof of the termination of the proceeding. *Bacon v. Townsend*, 6 Barb. 428.

In *Gallagher v. Stoddard*, 47 Hun, 101, where the plaintiff had been arrested on a criminal complaint, and where the plaintiff had paid a sum of money to the officer making the arrest and a receipt therefor was given by the plaintiff in settlement of all his claims, and a similar receipt by the officer, who signed the name of the justice issuing the warrant. *Held*, that the proceedings were not terminated so as to warrant an action for malicious prosecution; that the contention that the proceedings were terminated by the compromise under sections 663, 664, Code of Criminal Procedure, could not be sustained. The court said: "If it were to be admitted that the prosecution was terminated by the compromise, as provided for by the Code of Criminal Procedure,

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still we would not think such a compromise would constitute a termination of the prosecution that would justify an action for malicious prosecution." Citing *Wilkinson v. Howell*, Moo. & M. 495; *McCormick v. Sisson*, 7 Cow. 715; *Sartwell v. Parker*, 141 Mass. 405.

In *McCormick v. Sisson*, 7 Cow. 715, where the defendant had obtained a warrant against the plaintiff for theft, and where plaintiff was discharged before the justice because the parties had settled between them. *Held*, not to be such an acquittal as to warrant action for malicious prosecution.

Where the plaintiff was discharged by a magistrate because he was satisfied that there was no cause for commitment, the acquittal was held to be lawful, and to lay a sufficient ground for an action of malicious prosecution. *Secor v. Babcock*, 2 Johns. 203.

Where the defendant had caused the arrest of her daughter-in-law on charge of disorderly conduct, and where she was detained in jail over night and released next morning after examination, and where on the trial for malicious prosecution the magistrate's memory was at fault and was indefinite as to the grounds of dismissal, and where he thought he had discharged her after promising not to molest the defendant,—*Held* to be the duty of the court to submit to the jury the question of fact as to whether the charge was dismissed and the plaintiff acquitted, and also as to whether there was absence of probable cause. *Robbins v. Robbins*, 15 N. Y. Supp. 215.

Though the plaintiff is bound to prove that the proceedings instituted against him have been terminated by failure of the jury to indict or otherwise, yet proof of such fact is not conclusive evidence of the plaintiff's innocence, and the defendant may prove that he was in fact guilty of the crime charged. *Barber v. Gould*, 20 Hun, 446.

Where plaintiff had been committed to await the action of the grand jury, and before the jury met was discharged on *habeas corpus*,—*Held*, that such discharge was not a determination of the plaintiff's innocence, or a termination of the prosecution so as to uphold an action for malicious prosecution.

On the second appeal of the case of *Smith v. Smith*, 26 Hun, 573, an action founded upon malicious filing of a *lis pendens*,—*Held*, that the complaint should be dismissed upon the ground that the complaint did not show that the former prosecution had been

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ended. Brady, J., dissented. This complaint was formerly sustained on demurrer. See *Smith v. Smith*, 20 Hun, 555.

Where two actions in a justice's court failed because of the plaintiff's failure to appear, and a new action was commenced upon the same judgment, which was still pending, the litigation is not terminated. Want of probable cause cannot be inferred solely from the discontinuance of a former suit. *Palmer v. Avery*, 41 Barb. 290, affirmed 41 N. Y. 619.

In *Nebenzahl v. Townsend*, 61 How. Pr. 353, 12 Week. Dig. 511, it was held that where an action of malicious prosecution was brought when there was an appeal pending in the action in which plaintiff had been arrested, that such action was not terminated.

See also, to the same effect, *Peck v. Hotchkins*, 52 How. Pr. 226, where it was held that, although complaint in an attachment suit had been dismissed, yet the prosecution was not terminated if an appeal from the judgment of dismissal was taken and was still undetermined.

In *Sailesbury v. Creswell*, 14 Hun, 460, a nonsuit was sustained upon the ground that the plaintiff was not in a situation to maintain the action, because the litigation before a justice, wherein he was arrested, and the execution against his person was not terminated in his favor, and also upon the ground that the recovery of judgment before the justice was unreversed and in full force and effect, and that was evidence of probable cause. Distinguishing *Burt v. Place*, 4 Wend. 591.

If an order of arrest has been vacated upon the merits, an action of malicious prosecution lies in favor of the person arrested, and he is not obliged to wait until the action in which he has been arrested is terminated in his favor. It seems, however, that the rule is otherwise where there has been an appeal from the order vacating the arrest, so long as the appeal is pending. *Ingram v. Root*, 51 Hun, 238, 3 N. Y. Supp. 858.

Where the plaintiff had been arrested under the Stillwell Act and the warrant of arrest was dismissed on the affidavit, showing previous arrest, and an action for malicious prosecution was brought pending the defendant's appeal from the order dismissing the warrant, it was held that the prosecution was terminated within the meaning of the rule which requires it to be at an end before an action for malicious prosecution can be instituted. "When a party has final judgment in his favor upon trial, the

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prosecution is so far terminated that he may sue for malicious prosecution. If an appeal be taken from the judgment, that may furnish reason for staying the trial of the action for malicious prosecution until decision of the appeal. If the judgment should be affirmed, then it could not be held that the action was prematurely begun. If it should be reversed the action then would be pending and that action would furnish a defense. The party commencing the action, while the appeal is pending, simply takes the risk of an adverse decision upon the appeal, and thus suffer defeat in the action. *Marks v. Townsend*, 97 N. Y. 594.

Where the action is for abuse of legal process rather than for malicious prosecution, it is not necessary to allege or prove termination of the prosecution. *Bebinger v. Sweet*, 1 Abb. N. C. 263. (See Art. XI.)

One of the exceptions to the rule that the former prosecution must be terminated is where the prosecution complained of is malicious abuse of process. Thus, where the defendant has made use of a warrant of arrest for the collection of a common debt, and has extorted property from the plaintiff thereby, the latter may sue for the loss while the action of debt is pending. See *Graneer v. Hill*, 4 Bing. N. C. 212, and also cases cited.

Speaking of the necessity of showing a termination of the former prosecution, the court in *Bump v. Betts*, 19 Wend. 421, said: "The reason for this proof is advanced that otherwise he (plaintiff) might recover in this action and still be convicted or have judgment against him on the former suit." And the court further says: "That when the reason of the rule fails, the rule is not applicable," and thus where a former prosecution was proceeding by attachment against the plaintiff as having fled the county to defraud creditors, it was held not necessary to prove termination of the former suit as such proof is only required where the plaintiff had an opportunity to make a defense in the former action.

Judgment of criminal conviction is conclusive only between the parties; that is to say, between the plaintiff and defendant. There is no privity as between the defendant and strangers to the record. Where a judgment of conviction on a plea of guilty was obtained by fraud, duress, and conspiracy, the conviction is no bar to an action of malicious prosecution. *Johnson v. Girdwood*, 7 Misc. Rep. 652, 58 St. Rep. 338, 28 N. Y. Supp. 151.

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**SUBDIVISION 8.****Damage to Plaintiff.**

Some text-book writers have included proof of damage as one of the elements in an action for malicious prosecution. Bigelow on Torts, 90. But this element seems in general to have been disregarded by the courts, probably because in a majority of the cases the damage is presumed, as, for example, the injury to reputation, arising out of an arrest, the humiliation, etc.

In regard to the requirement that damage be caused it should be noted that such damage need not be necessarily pecuniary. "It may be either damage to a man's fame, as if the matter he is accused of be scandalous, or where he has been put to any danger of loss of life or limb or liberty, or damage to his property, as where he is obliged to spend money in necessary charges to acquit himself of the crime of which he is accused." Mayne on Damages, 345.

The elements of damage in malicious prosecution are thus stated by the annotator in *Burlingame v. Burlingame*, 8 Cow., at p. 145, note: "The damage \* \* \* must be either to the person by imprisonment, to the reputation by scandal, or to the property by expense."

In *Frierson v. Hewitt*, 2 Hill (S. C.), 499, it was held that where the defendant procured the defendant to be indicted for killing the former's cattle, the plaintiff must prove special damage, for the offense, though charged as a crime, was only a trespass. So, too, where the defendant falsely prefers against the plaintiff a charge of assault and battery, without cause and with malice, etc. *Byrne v. Moore*, 5 Taunt. 187.

"In an action for malicious prosecution the plaintiff is entitled to recover not only for the unlawful arrest and imprisonment and the expenses of his defense, but also for the injury to his fame and reputation, occasioned by the false accusation. The latter, indeed, is in many cases the gravamen of the action. An accusation of crime, made under the forms of law, or upon the pretense of bringing a guilty man to justice, is made in the most imposing and impressive manner, and may inflict a deeper injury upon the reputation of the party accused than the same words uttered under any other circumstances. The most appropriate remedy for the calumny in such cases is by an action for malicious prosecution."

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*Held*, as a consequence, that when there has been a recovery in an action for malicious prosecution it is a bar to a subsequent action for slander for the same cause. *Sheldon v. Carpenter*, 4 N. Y. 580.

### ARTICLE IV.

#### WHEN ACTION CAN BE MAINTAINED.

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#### SUBDIVISION 1.

##### Criminal Prosecution and Arrest.

The early English cases allowed an action against the magistrate for malicious conviction, in which case it was said that it was not sufficient to show that the plaintiff was innocent of the offense of which he was convicted, but he must also show, from what passed before the magistrate, that there was want of probable cause. Besides the want of probable cause malice must also be shown, either express, or apparent from the proceedings. See note to *Burlingame v. Burlingame*, 8 Cow., at p. 145, with cases cited.

Where the defendant's conductor caused the arrest of a passenger by a policeman without warrant, and where he was taken before a magistrate and discharged for lack of complaint,—*Held*, that there was no judicial proceeding which would warrant a subsequent action for malicious prosecution. The proper remedy was for false imprisonment. *Barry v. Third Ave. Ry. Co.*, 51 App. Div. 385, 64 N. Y. Supp. 615, 98 St. Rep. 615.

In England it has been held that an action for malicious prosecution may lie even where the defendant was bound over to prosecute. In *Du Bois v. Keats*, 11 A. & E. 329, the defendant in a civil action had falsely sworn that a document was signed by the plaintiff, and the judge, believing the plaintiff had committed perjury in denying the same, committed him for trial and bound over the defendant to prosecute. Upon his acquittal the plaintiff brought an action for malicious prosecution. The court said: "In my opinion \* \* \* a prosecution, though in the outset not malicious \* \* \* may nevertheless become malicious in any of the steps through which it has to pass, if the prosecutor

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having acquired positive knowledge of the innocence of the accused perseveres *malo animo* in the prosecution with the intent of procuring *per nefas* a conviction of the accused."

In *Wanser v. Wyckoff*, 9 Hun, 178, defendant caused plaintiff's arrest for using defendant's boat. Plaintiff had taken the boat several times and returned it. Defendant caused his arrest for grand larceny. *Held*, that the fact that the boat was regularly returned removes one of the essential elements of the crime, and rendered it at most but a mere trespass. Thus, there was an entire absence of probable cause, and the judgment was affirmed.

For a case where the prosecution complained of was founded upon a charge that the plaintiff had opened a sealed letter, contrary to the provisions of section 642 of Penal Code, see *McCormack v. Perry*, 47 Hun, 71, overruling *Lawyer v. Loomis*, 3 T. & C. 396.

Where it is a question whether or not the defendant instigated the prosecution, it is a question of fact for the jury, and if there is any evidence upon this point, however slight, the court cannot dismiss the complaint. Upon this point the court said: "This prosecution may be in the form of a civil or of a criminal proceeding, and when conducted in the name of the offending party it would doubtless suffice to prove that he was the real party, the mover, and manager, and controller of the prosecution. If he were the mere clerk or agent of others or a mere witness in the transaction, he would not hold the character, nor be liable to the penalties of a malicious prosecutor." *Miller v. Milligan*, 48 Barb. 30.

For a case where the verdict was sustained where the defendant had caused the arrest of the plaintiff, his partner, in an effort to collect a sum of money, see *Griffin v. Keeney*, 27 App. Div. 492, 84 St. Rep. 721, 50 N. Y. Supp. 721.

Where defendant had caused plaintiff's arrest for stopping payment on a check which he had sent to defendant in payment for certain goods, which defendant failed entirely to deliver,—*Held*, that there was entire absence of probable cause for plaintiff's arrest. *Bandell v. May*, 39 St. Rep. 432, 15 N. Y. Supp. 273.

See *Neil v. Thorne*, 17 Hun, 144, for a case involving the arrest of plaintiff, a school teacher, for collecting money upon an order signed by only one of the school trustees, where he had agreed to procure the signatures of other trustees before it was ended.



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For a cause involving attempt to collect a debt by use of criminal process, see *Reynolds v. Heywood*, 77 Hun, 131, 59 St. Rep. 47, 28 N. Y. Supp. 467; *Matters v. La Maida*, 74 Hun, 432, 57 St. Rep. 178, 26 N. Y. Supp. 471.

See further cases under "Elements of the Wrong."

**SUBDIVISION 2.****Civil Prosecution.**

In some jurisdictions it has been held that where one prosecutes an action in the name of a third person, without authority, he is liable to the person sued, although not acting maliciously, and although the third person had a good cause of action. *Bond v. Chapin*, 8 Metc. 431; *Foster v. Dowd*, 29 Me. 442.

Where the prosecution complained of was an action for libel brought in a justice's court, which was without jurisdiction, and where the same was discontinued upon the return day on account of lack of jurisdiction,—*Held*, that defendant was not liable for the malicious prosecution unless it was shown that the justice's court was without jurisdiction, and that the burden was upon the plaintiff. *Eldred v. Fawdrey*, 16 St. Rep. 83.

For a case where the verdict was sustained in an action where the prosecution complained of was arrest of the plaintiff in an action for trespass, see *Ferguson v. Arnow*, 50 St. Rep. 852, 21 N. Y. Supp. 308.

For a case involving arrest in an action for trespass, where it was held that a nonsuit was proper on account of failure to show malice and want of probable cause, see *Witham v. Thomas*, 50 St. Rep. 884, 21 N. Y. Supp. 176.

In *Hodges v. Richard*, 30 App. Div. 158, 85 St. Rep. 869, 51 N. Y. Supp. 869, a dismissal of the complaint was reversed in an action where the alleged malicious prosecution was the arrest of the plaintiff in a civil action for moneys received by plaintiff in a fiduciary capacity.

In *Brown v. McIntyre*, 43 Barb. 344, the defendant had caused the arrest of the plaintiff in a suit in Canada upon an affidavit greatly overstating the amount due. The plaintiff was imprisoned about eighteen months. *Held* an action for malicious prosecution would lie. The court cites 3 Phillips on Evidence, 261, as follows: "Where there have been mutual dealings between the plaintiff and defendant, and items are ascertained to be due on

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each side of the account, an arrest for the amount of one side of the account without taking what is due on the other, is malicious and without probable cause." Citing English authorities on this point.

In *Bradner v. Faulkner*, 93 N. Y. 515, reversing 16 Week. Dig. 240, an action for malicious prosecution arose out of an attachment against the plaintiff under Laws of 1858, chap. 190, which gives boards of supervisors power to examine persons as witnesses, and for refusal to obey subpoena, to attach said person as for contempt.

In *Besson v. Southard*, 10 N. Y. 236, the malicious prosecution consisted in procuring the plaintiff to be held in an action of trespass upon the case.

It was held that the action might be founded on the prosecution of a civil suit and attachment of the plaintiff's property therein. *Willard v. Holmes, Booth & Hayden*, 2 Misc. Rep. 303, 51 St. Rep. 569, 21 N. Y. Supp. 998, reversed 142 N. Y. 492.

In *Smith v. Smith*, 20 Hun, 555, affirming 56 How. Pr. 316, a complaint for the malicious filing of a *lis pendens* was upheld on demurrer. The court said: "It would be extraordinary indeed if the plaintiff, under such circumstances, had no remedy and that a proceeding created for a wise purpose and for good ends could be used by a suitor with malice aforethought, without incurring any personal responsibility." But a demurrer was subsequently sustained on the ground that termination of former prosecution was not alleged. 26 Hun, 573.

The decision on the latter appeal was distinguished in *Ingram v. Root*, 51 Hun, 238 (241), 3 N. Y. Supp. 858, where it was held that after an order of arrest has been vacated upon the merits, the party against whom the action is brought is not obliged to wait until such action has been decided in his favor before instituting an action for malicious prosecution based upon such arrest. It appears the rule would be otherwise in case the order vacating the order of arrest is appealed from, and that the burden of showing any appeal was taken rests upon the plaintiff, and his cause of action is not complete unless the complaint contains an averment thereof. See *Marks v. Townsend*, 97 N. Y. 394.

Where the prosecution complained of was an action for replevin for steamship tickets, brought by a corporation against its agent, — *Held*, that the fact that the corporation by mistake demanded the

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return of too many tickets on replevin did not indicate malice, or tend to show want of probable cause. *Sheahan v. National Steamship Co.*, 66 Hun, 48, 49 St. Rep. 484, 20 N. Y. Supp. 740.

The malicious institution of bankruptcy proceedings is malicious prosecution. *Chapman v. Pickersgill*, 2 Wils. 145; *Farley v. Danks*, 4 El. & Bl. 493.

In England it has been held that an action will lie against a person who falsely, maliciously, and without probable cause brings a proceeding to wind up the affairs of a corporation, whereby its credit is injured. *Quartz Hill Gold Mining Co. v. Eyre*, 11 Q. B. Div. 674.

An action on the case will lie for maliciously obtaining or executing a search warrant. *Cooper v. Booth*, 1 T. R. 535.

In *Johnston v. Comstock*, 14 Hun, 238, a recovery was sustained against defendant for the malicious issuing of a search warrant, and the search of plaintiff's premises thereunder. The action, however, was in the form of trespass for alleged illegal entry upon premises of the plaintiff.

Recent English decisions have allowed an action founded upon maintenance, which is a criminal offense, the action being allowed only where the defendant had aided in the prosecution of some suit in which he had no interest or motive other than stirring up and keeping alive strife. If based on charity, whether reasonable or not, the action will not lie. Bigelow on Torts, 114, citing *Bradlaugh v. Newdegate*, 11 Q. B. Div. 1; *Harris v. Brisco*, 17 Q. B. Div. 504; *Met. Bank v. Pooley*, 10 App. Cas. 210. For American cases, see *Hovey v. Hobson*, 51 Me. 62; *Duke v. Harper*, 2 Mo. App. 4; *Goodyear Dental Vulcanite Co. v. White*, 2 N. J. L. 150; *Fisher v. Kamala Naicher*, 8 Indian App. 170, 8 W. R. 655.

## ARTICLE V.

## DEFENSES.

It has not seemed advisable to treat defenses fully as a separate heading; and reference is made to article III, "Elements of the Wrong," the absence of any of which elements is a defense. What in other actions would be called justification, in this action takes the name "Probable Cause," the existence of which is a defense.

There is, however, a defense sometimes set out as bearing on malice, and which is here treated. Advice of counsel is only a

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defense in so far as it may tend to prove probable cause and disprove malice. And to have that effect it should appear that the advice of counsel was obtained after a full, fair, and honest statement of all the facts concerning the guilt of the person suspected. *Willard v. Holmes, Booth & Hayden*, 2 Misc. Rep. 303, 51 St. Rep. 569, 21 N. Y. Supp. 998.

It is said that the question of advice of counsel as a defense is a "subject upon which there has been much of inadvertence, it being often said that advice of counsel that the plaintiff was guilty of the offense, given upon all the facts, is a complete defense; but that this is not the rule is no longer open to discussion with us." Citing *Hazzard v. Flury*, 120 N. Y. 223; *Brown v. McBride*, 24 Misc. Rep. 236, 52 N. Y. Supp. 620.

Advice of counsel, while proper upon the question of malice, does not go to the question of probable cause, for while probable cause may be founded upon misinformation as to facts, it cannot be founded upon mistake of law. *Hazzard v. Flury*, 120 N. Y. 223, 30 St. Rep. 906.

It is not error for a court to refuse to charge that "advice of counsel given on a full and fair statement of his case, and acted upon in good faith, is a good defense," because the request limits the advice to a statement of the defendant's case instead of a statements of the facts, circumstances, knowledge, and information possessed by the defendant. *Hall v. Kehoe*, 28 St. Rep. 357, 8 N. Y. Supp. 176.

*Bona fide* acts of a party done on advice given by counsel after full and fair statement of the facts is evidence of probable cause, however erroneously made. *Richardson v. Virtue*, 2 Hun, 211, 4 T. & C. 441.

Advice of counsel bears upon the question of probable cause only when there is a question for the jury as to probable cause. "Where the undisputed facts make the question of probable cause for the court, advice of counsel is of no weight on that head." *Brown v. McBride*, 24 Misc. Rep. 236, 52 N. Y. Supp. 620.

The defendant may show advice of counsel, as it bears upon the good faith of the defendant. *Turner v. Dinnegar*, 20 Hun, 465.

Advice of counsel cannot affect the question of damages unless it is shown that the advice was based upon the facts truly stated to the counsel. *Howe v. Oldham*, 69 Hun, 57, 53 St. Rep. 327, 23 N. Y. Supp. 703.

## Art. 6. Parties.

Advice of counsel standing alone does not free a client from the imputation of malice. To have that effect the question must be one of law, or some legal principle must be involved, in order to a proper decision of which the law applicable to the question must be ascertained. If the client in such a case acts in good faith upon the advice of counsel, there cannot be a charge of malice. *Laird v. Taylor*, 66 Barb. 142.

Where a party lays his case fully and fairly before counsel and acts in good faith on the opinion given by such counsel, however erroneous the opinion may be, it is sufficient evidence of probable cause and a good defense in an action for malicious prosecution. But in such a case it is a proper question for the jury whether the party acted *bona fide* on the opinion given him, believing that the plaintiff was guilty of the crime of which he was accused. So held in *Hall v. Suydam*, 6 Barb. 83. See cases cited *supra*.

In England the defendant who lays the true facts of an action before counsel and acts *bona fide* upon the opinion of the counsel, though the same be erroneous, is not liable to an action for malicious prosecution. *Ravenda v. McIntyre*, 2 B. & C. 693.

But if he does not act *bona fide* on the opinion or believe that he has cause for prosecution, or neglects to state all the facts, or selects an ignorant counsel to shield his malice, he may be liable. *Ravenda v. McIntyre*, 2 B. & C. 693; *Hawlett v. Cruchley*, 5 Taunt. 277.

It is error to reject evidence offered by defendant to show that he stated facts within his knowledge touching the charges made against the plaintiff to an attorney and also to a justice of the peace, asking their advice, which he received. *Turner v. Dinnegar*, 20 Hun, 465, citing 2 Greenl. Ev. 459; *Richardson v. Virtue*, 2 Hun, 208; *Laird v. Taylor*, 66 Barb. 139.

## ARTICLE VI.

## PARTIES.

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## SUBDIVISION 1.

## Plaintiffs.

Where parties, without probable cause and with the willful and malicious intent of injuring a surviving partner and a corporation

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to which such partner had conveyed certain assets, institute involuntary bankruptcy proceedings against such surviving partner, two distinct causes of action arise, one in favor of the surviving partner for the damages sustained by him personally, and one in favor of the corporation for the damages sustained by it. Neither the corporation nor the surviving partner has any legal interest in the cause of action arising in favor of the other, and they cannot join in a complaint to recover damages sustained by both, because of the bankruptcy proceedings. *Lawrence v. McKelvey*, 80 App. Div. 514, 81 N. Y. Supp. 129.

**SUBDIVISION 2.****Defendants.**

The instigator of the malicious prosecution is liable, although the formal complaint upon which the plaintiff was arrested was made by another person. So held where a domestic servant was arrested on the complaint of a police officer upon the instigation of her master. *Dann v. Wormser*, 38 App. Div. 460, 90 St. Rep. 474, 56 N. Y. Supp. 474.

Where the complaint was made by defendant's agent, but the defendant retained counsel who appeared against plaintiff and instructed him to procure a warrant, and he attended the trial,—*Held*, that he was the real prosecutor. *Gierhon v. Ludlow*, 25 St. Rep. 352, 6 N. Y. Supp. 111.

Where the attorney of an insurance company verified the information stating that the plaintiff had appropriated, etc., moneys of the company and procured a warrant for his arrest, it was held that he had made himself a party to the prosecution and was not in a position to claim the protection of the professional privilege, and that it was error to dismiss the complaint against him. *Whitney v. N. Y. Casualty Ins. Assn.*, 27 App. Div. 321, 50 N. Y. Supp. 227, 84 St. Rep. 227.

The liability of a partner for a malicious prosecution by his fellow partner is considered in *Farrell v. Friedlander*, 63 Hun, 254, 43 St. Rep. 445, 18 N. Y. Supp. 215. The court comments upon the statement in Abbott's Trial Evidence, p. 217, that "if the act itself was one within the scope of the business and done as such, then it is not material that the other partners were ignorant and innocent, nor that it was willful; otherwise, if the act was

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wholly foreign to the business." The court says: "I can find, however, no case which goes to the extent of holding that the malicious prosecution of offenders has been admitted to be within the power constructively delegated to one partner as the agent of another." Further the court said: "I do not think it can be claimed that a prosecution undertaken by one partner, without consultation with and approval by his copartner, can hold the latter liable, because it cannot be assumed that a malicious prosecution by one, even in regard to supposed thefts of partnership property, is within the scope of his partnership authority, so as to make him, in respect thereto, the agent for his copartners." Judgment was, therefore, reversed as to one of the defendants on the ground that there was no evidence to show that he was in any way consulted, took part in, knew of or approved of the prosecution. The court further says, in reversing judgment as to one: "It is doubtful if it can be permitted to stand as against the other." Citing *Lewis v. Kahn*, 5 N. Y. Supp. 661.

It is now well settled that a private corporation is liable *civiliter* for malicious prosecution. *Willard v. Holmes, Booth & Hayden*, 2 Misc. Rep. 304, 51 St. Rep. 569, 21 N. Y. Supp. 998, and cases cited.

An action for malicious prosecution lies against a corporation as well as an individual. The court said: "The motive for the corporate suit is imputed to the corporation, and not to the individual directors." *Willard v. Holmes et al.*, 142 N. Y. 496, 60 St. Rep. 89.

Malicious prosecution lies against a corporation, and evidence that the general manager and general counsel of the corporation laid information charging plaintiff with a crime is sufficient to warrant a finding that the corporation was responsible for the prosecution. *Scott v. Dennett, etc., Co.*, 51 App. Div. 321, 98 St. Rep. 1016, 64 N. Y. Supp. 1016.

The malice of the officers and employees of the corporation accompanying the performance of the acts within, or incidental to the discharge of their duties, is imputable to the corporation, unless those acts were intended as a mere cover for the accomplishment of some independent and wrongful purpose. *Willard v. Holmes et al.*, 2 Misc. Rep. 303, 21 N. Y. Supp. 998.

A corporation is not chargeable with the malice of its clerks in testifying on a criminal process, such testimony not being

## Art. 7. Pleading.

within the scope of their employment. *Kutner v. Fargo*, 20 Misc. Rep. 207, 79 St. Rep. 753, 45 N. Y. Supp. 753.

For a case where the malice of the manager of an insurance company in causing the arrest of a collecting agent was held to be imputable to the corporation, because within the scope of his authority, see *Manasha v. Royal Benefit Society*, 21 Misc. Rep. 474, 81 St. Rep. 628, 47 N. Y. Supp. 628.

In *Purcell v. Long Island City*, 84 Hun, 439, 65 St. Rep. 537, 32 N. Y. Supp. 302, it was held that where the prosecution complained of was that of a school trustee of a municipality, who, as such, charged the plaintiff with stealing certain property belonging to the municipality, and where the corporation counsel appeared against the plaintiff, and where the proceedings on trial were published in the newspapers of the city, and where the charge was finally dismissed, that such evidence was not sufficient to connect the municipality with the prosecution of the criminal charge, and that a nonsuit was correct. In reaching this decision the court said: "It is not necessary upon this appeal to decide whether an action for malicious prosecution can be maintained against a municipal corporation, because the facts failed to connect the defendant with the prosecution of this case."

This has long been an open question in England and the action denied on the ground that malice is necessary, and a corporation, having no mind, could not be malicious. *Stevens v. Midland Ry.*, 10 Exch. 352; *Abrath v. North-Eastern Ry.*, 11 App. Cas. 247.

## ARTICLE VII.

## PLEADING.

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## SUBDIVISION 1.

## Complaint.

In *Stokes v. Behrenes*, 23 Misc. Rep. 442, 86 St. Rep. 251, 52 N. Y. Supp. 251, it was held that where the complaint states all the facts supporting both false imprisonment and malicious prosecution, the plaintiff should be compelled to elect between the two;



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that they were inconsistent, and that the election may be compelled on the trial or by motion before answer.

In *Nebenzahl v. Townsend*, 61 How. Pr. 353, 12 Week. Dig. 511, it was held that actions for malicious prosecution and false imprisonment cannot be joined. That they are inconsistent, and the plaintiff must elect between them.

Action for false imprisonment and malicious prosecution may be united in the one complaint, and plaintiff cannot be compelled to elect between them. *Thorpe v. Carvalho*, 14 Misc. Rep. 554, 36 N. Y. Supp. 1, 70 St. Rep. 760.

In *Warren v. Dennett*, 17 Misc. Rep. 86, 39 N. Y. Supp. 830, it was held that causes of action for false imprisonment and malicious prosecution are consistent with each other and may be presented in the same complaint.

Malicious prosecution and false imprisonment are both actions for personal injuries; are consistent with each other, and one is not destructive of the other, and it has been good practice to unite them in one complaint. If objection to the union of these causes of action in the complaint is not taken by answer or demurrer it is in any event waived. *Marks v. Townsend*, 97 N. Y. 594.

A complaint alleging that the defendant led plaintiff into making a hard and unconscionable lease, and after the plaintiff had sown crops had turned him off and had procured his arrest upon a malicious charge of embezzlement, and took possession of his household goods, etc., and that all these acts were in pursuance of defendant's plan to defraud plaintiff, states but one cause of action. *Bebinger v. Sweet*, 1 Abb. N. C. 263.

It was held further in this case that the action was an action for the abuse of process and was not an action for malicious prosecution, breach of contract, conversion, etc. That these elements were mere elements of damage, and merely evidence of the fraudulent plan and design of the defendant. Therefore, that as the action was not for malicious prosecution it was not necessary to allege the termination of the former prosecution, nor to prove it. That such an action may be maintained without it. Citing 2 Greenl. Ev. 452; *Grainger v. Hill*, 4 Bing. N. C. 212.

The reporter's note makes reference to *Heywood v. Collinge*, 9 Ad. & El. 268; *Tomlinson v. Warner*, 9 Ohio, 103; *Stancliff v. Palmeto*, 18 Ind. 321; *Dauchy v. Salisbury*, 29 Conn. 124.

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Where the plaintiff alleged the publication in a newspaper of an article on his arrest at the charge of defendant, setting out the newspaper article in full,—*Held*, that the article should be stricken out as irrelevant. So far as the matter was libelous it could not be united in a cause of action for malicious prosecution, and if inserted to show publicity, it was evidence and should not be pleaded. *Haughie v. New York & New Jersey Telephone Co.*, 34 Misc. Rep. 634, 70 N. Y. Supp. 584, 104 St. Rep. 584.

Where the complaint contains more than one cause of action it must be divided into distinct counts. Failure to do this subjects every allegation which is not essential to a single cause of action to be stricken out as redundant. *Benedict v. Seymour*, 6 How. Pr. 298 (Code of Procedure).

The complaint must allege that the prosecution was without probable cause. Such defect is not waived by failure of the defendant to demur, because such complaint does not state facts sufficient to constitute a cause of action. Neither is the presumption of malice an allegation of the want of probable cause. *Palmer v. Palmer*, 8 App. Div. 331, 40 N. Y. Supp. 829.

The complaint must allege want of probable cause and malice, and a mere allegation that the defendant maliciously charged plaintiff with a crime is not sufficient. Nor is an allegation that the charge was false and that the plaintiff was acquitted. *Cousins v. Swords*, 14 App. Div. 338, 77 St. Rep. 907, 43 N. Y. Supp. 907.

Where the complaint alleged merely an action for malicious prosecution, and at the end of the trial the plaintiff moved for an amendment so as to authorize a recovery for false imprisonment as well,—*Held*, that the allowance of such an amendment was error. *Cumber v. Schoenfeld*, 34 St. Rep. 770, 12 N. Y. Supp. 282, 16 Daly, 454.

Where the plaintiff relies upon the fact that the order upon which he was arrested has been vacated upon its merits, and that there has been no appeal from the order vacating, the burden is upon him to show that there is no such appeal, and his cause of action is not complete unless his complaint contains an allegation thereof. *Ingram v. Root*, 51 Hun, 238, 3 N. Y. Supp. 858.

An allegation of the complaint that the plaintiff was acquitted by the magistrate is equivalent to an allegation that the magis-

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trate discharged him. *School v. Schnebel*, 29 St. Rep. 676, 8 N. Y. Supp. 855.

It seems that the complaint may be amended on trial so as to add an allegation that the prosecution was ended. *Ames v. Stearns*, 37 How. Pr. 289, 55 Barb. 194.

In malicious prosecution for obtaining an order of arrest against the plaintiff in another action, the complaint is defective where it fails to state that the order of arrest has been vacated, or judgment rendered for the defendant, unless it appears that the order was a nullity *ab initio*. *Searle v. McCracken*, 16 How. Pr. 262.

The allegation that the prosecution has been terminated in plaintiff's favor by the entry of a *nolle prosequi* on motion of the district attorney and with leave of the court, etc., is a sufficient averment of the termination of the criminal charge in plaintiff's favor. The allegation that the prosecution has been terminated, and terminated in favor of the plaintiff is a necessary allegation. *Moulton v. Beecher*, 1 Abb. N. C. 193.

A complaint is demurrable which does not allege that the prosecution complained of has been legally and finally terminated. *Thomason v. De Mott*, 18 How. Pr. 529, 9 Abb. Pr. 242.

The complaint must allege special damage, such as injury to business, or the same cannot be proved. *Evins v. Metropolitan Ry. Co.*, 47 App. Div. 511, 62 N. Y. Supp. 495.

Where a complaint fails to allege want of probable cause, and the evidence of the plaintiff on that point is not satisfactory, the court should not allow an amendment of the complaint to conform the pleading to proof, nor incorporate into it an essential allegation of want of probable cause. *Palmer v. Palmer*, 8 App. Div. 331, 40 N. Y. Supp. 829.

**SUBDIVISION 2.****Answer.**

Where the answer set up a counterclaim, stating a cause of action for deceit on part of plaintiff, in that he induced the defendant to sell goods on credit by fraudulent representations, which was alleged to have been one of the causes of action for which the prosecution of the plaintiff was instituted,—*Held*, that a counterclaim was bad upon demurrer; that it did not arise out of the same transaction and was not connected with the subject-matter of the action. The plaintiff's action was in tort for per-

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sonal injury, and the defendant's counterclaim arose out of contract. *Rothschild v. Whitman*, 57 Hun, 135, 32 St. Rep. 560, 19 Civ. Proc. 58, 10 N. Y. Supp. 427, affirmed 132 N. Y. 472.

Where the answer admits the allegations of the complaint that the former prosecution had been terminated favorably to the accused, the fact must be deemed established and the defendant cannot show that the police justice who tried the case was without jurisdiction, where no such fact is alleged in the answer. *Siefke v. Siefke*, 6 App. Div. 472, 39 N. Y. Supp. 601.

Where the prosecution complained of was one which charged the plaintiff with larceny in the disposition of notes of a corporation, of which he was the president, and where the answer alleged that the books of corporation showed large discrepancies and that the proceeds of certain corporate notes were not accounted for, and that other notes had been misappropriated by the plaintiff,—*Held*, that this allegation should not be stricken out as irrelevant. *Dunton v. Hagerman*, 18 App. Div. 146, 80 St. Rep. 758, 46 N. Y. Supp. 758.

In *Morris v. Carson*, 7 Cow. 281, where the sole plea of the defendant was that the facts involved in the prosecution were true, it was held that by such answer he assumed to prove the truth upon his own side, and that the plaintiff could not on the trial, in the first instance, show want of probable cause. This decision was under the common-law pleading.

For a discussion as to the proper form of an answer containing several defenses, see *Benedict v. Seymour*, 6 How. Pr. 298.

**SUBDIVISION 3.****Bill of Particulars.**

Where the complaint alleged that the former prosecution, under which he had been arrested, was extensively published in the newspapers, and in consequence many persons had refused to do business with him, believing him to have been guilty, it is held that the defendant is entitled to a bill of particulars as to the names of the newspapers and the persons who had refused to do business with him. *Dietz v. Leber*, 33 App. Div. 563, 87 St. Rep. 977, 53 N. Y. Supp. 977.

## Art. 7. Pleading.

## FORMS.

## COMPLAINTS.

## Malicious Civil Action — with Arrest.

## SUPREME COURT — NEW YORK COUNTY.

ABRAHAM ROTHSCHILD, Plaintiff,

*agst.*

BRYCE GRAY, WILLIAM MILLER, CLARENCE WHITMAN et al., Defendants.

Complaint, 132 N. Y. 472.

Plaintiff complains of the defendants and alleges:

*First.* That on or about September 1, 1887, the plaintiff was engaged in business in the city of New York, as manager of the dry goods business of Mayer Rothschild, and was, on or about said date, conducting the said business as manager.

*Second.* That on or about said date, the defendants not having any just or probable cause of action against the plaintiff, did then and there wrongfully, unlawfully, and maliciously begin an action against the plaintiff, and did cause to be issued out of the Supreme Court of the State of New York, in and for said county, a certain alleged order of arrest, in an action in which the defendants were plaintiffs, and placed the same in the hands of the sheriff of the city and county of New York for service, and did thereupon cause the plaintiff to be taken into custody by the said sheriff thereunder, and held to bail in the sum of \$10,000, and that plaintiff was kept in custody under said pretended order of arrest by the said sheriff for one week, and was compelled to, and did, disburse large sums of money, aggregating one thousand of dollars, in and about said arrest, and to counsel, and that plaintiff, by reason of this said arrest, was compelled to give up said business, and was greatly injured in his good name and credit among merchants in the city of New York, and elsewhere, and among his friends and acquaintances, and suffered greatly in body and mind by reason of the disgrace attendant thereon.

*Third.* That thereafter, and upon the motion of this plaintiff, the said alleged order of arrest was duly vacated by the said Supreme Court, and upon the ground that the same was illegal, unauthorized, and that the court had no jurisdiction to grant the same, and an order was duly entered thereon on or about the 29th day of December, 1887, and defendant discharged thereunder, and that said proceeding has been wholly and finally terminated in favor of the plaintiff and against the said defendants by final order of the said court.

*Fourth.* That by reason of the premises plaintiff suffered damage in the sum of \$50,000.

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WHEREFORE plaintiff demands judgment against the defendants for his damages aforesaid, in the sum of \$50,000, with interest thereon from said date, besides the costs of this action.

HORWITZ & HERSHFELD,  
Plaintiff's Attorneys.

**Malicious Prosecution; Joined with False Imprisonment.**  
SUPREME COURT — KINGS COUNTY.

FREDERICK B. GEORGE, Plaintiff,

*agst.*

DAVID JOHNSTON and EDWARD F. LINTON, Defendants.

Complaint, 25 App. Div. 125.

The plaintiff complaining of the defendants alleges:

*First.* That at the city of Brooklyn and on or about the 15th day of June, 1895, the defendants wrongfully and maliciously concerted, and conspired together, and wrongfully, unlawfully, and maliciously, and without reasonable or probable cause procured, and caused to be procured from a police magistrate of the said city of Brooklyn a warrant for the arrest and apprehension of plaintiff upon a false, unfounded, and malicious charge of grand larceny. That said charge was preferred against the plaintiff by the defendant, David Johnson, who acted in his own behalf, and at the request and instigation of the codefendant, Edward F. Linton.

*Second.* That on the 29th of June, 1895, the defendants wrongfully, maliciously, and unlawfully, and without any reasonable or probable cause, procured the arrest and apprehension of plaintiff, and caused the plaintiff to be detained against his will, forcibly, wrongfully, and maliciously upon said false and malicious charge.

*Third.* That by virtue of the said warrant plaintiff was arrested by an officer of the law at his place of business in the city of New York and carried before the police magistrate issuing the said warrant, and confined in a room, crowded and filthy, and was then and there compelled to give bond in the sum of \$5,000 to appear for examination therein.

*Fourth.* That defendants falsely and maliciously and without any reasonable or probable cause procured plaintiff to be arraigned before said court and compelled him to plead to said felonious charges.

*Fifth.* That plaintiff pleaded not guilty to the said false and malicious charge so preferred against him; that plaintiff was deprived of his liberty from the time of his arrest, viz., the 29th day of June, until the 3d day of July, 1895, the day set by the said magistrate

## Art. 7. Pleading.

for his examination, when upon statements and allegations made by the district attorney representing Kings county, and also on behalf of the defendants, touching and concerning the said supposed offense, then and there, to wit, on the 3d day of July, 1896, the said police magistrate before whom plaintiff was arraigned, adjudged and determined that the said plaintiff was not guilty of the said supposed offense, and then and there caused the said plaintiff to be discharged and acquitted of the said supposed crime of grand larceny, and the said complaint and prosecution therein dismissed; that the defendants and each of them have abandoned the said proceedings, and that the same was wholly ended and determined in plaintiff's favor before the commencement of this action.

*Sixth.* That by reason of the wrongful and malicious charges preferred against the plaintiff as hereinbefore set forth, the plaintiff has been greatly injured in his credit and reputation, and brought into public scandal, infamy, and disgrace with his neighbors, to whom his innocence in the premises is unknown, and has suffered great anxiety and pain of body and mind, compelled and obliged to lay out and expend sums of money in procuring his discharge from the said imprisonment, and defending himself in the premises and the manifestation of his innocence in that behalf and by reason, and by means of the said premises the plaintiff has suffered damages in the sum of \$5,000.

WHEREFORE plaintiff demands judgment against the defendant for the sum of \$5,000, together with the costs and disbursements of this action.

(Verified.)

DARLINGTON & JENKINS,  
*Attorneys for Plaintiff.*

**Answer, with Justification, Etc.**

**SUPREME COURT — KINGS COUNTY.**

FREDERICK B. GEORGE, Plaintiff,

*aget.*

DAVID JOHNSON and EDWARD F. LINTON, Defendants.

Answer, 25 App. Div. 125.

The defendants appearing in this action by Israel F. Fischer, their attorney, answer the complaint herein as follows:

*First.* They aver that heretofore in the city of Brooklyn, and on or about the 15th day of June, 1895, the plaintiff did take and carry

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away the wooden fence belonging to the defendant Johnson, and did store the same in the premises occupied by the plaintiff; that because of such larceny, the defendant Johnson did cause a warrant to be issued against this plaintiff, under which he was arrested and arraigned before a police magistrate of the city of Brooklyn.

That upon such arraignment the defendant Johnson, upon the advice of the district attorney for Kings county, who appeared and prosecuted said case, amended his charge from one of grand larceny to one of petit larceny; that upon the said trial this plaintiff admitted the taking of said fence, and the storing thereof in his cellar, but denied that he did so with criminal intent, and upon said state of facts the trial magistrate, after reprimanding the plaintiff, dismissed said complaint.

These defendants deny that they wrongfully and maliciously, or otherwise, conspired in this plaintiff's arrest, or that the warrant so procured against him was obtained wrongfully, unlawfully, or maliciously, or without reasonable or probable cause, or that his arrest thereunder was procured wrongfully, unlawfully, or maliciously, or that the plaintiff has suffered damage in the sum of \$5,000, or in any sum whatever.

*Second.* Except as hereinbefore set forth, these defendants deny each and every allegation set forth in paragraphs first, second, third, fourth, and fifth of the complaint.

WHEREFORE defendants demand that the complaint herein be dismissed, with costs.

ISRAEL F. FISCHER,  
*Attorney for Defendants.*

## ARTICLE VIII.

## EVIDENCE.

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## SUBDIVISION 1.

## Of Probable Cause.

Where defendant with full knowledge of the circumstances paid a sum of money and subsequently commenced an action to recover it back on the ground of overpayment, such facts were held to



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warrant the inference that the prosecution was vexatious and coupled with an avowed purpose of the defendant to make the plaintiff come four times a distance of fourteen miles, to show express malice. *Pangburn v. Bull*, 1 Wend. 345.

Where the prosecution complained of was plaintiff's arrest on a charge of feloniously taking property,—*Held*, that evidence that the party making the complaint knew that a third party had a *prima facie* right to the property was sufficient evidence of want of probable cause. *Weaver v. Townsend*, 14 Wend. 192.

Proof that the prosecution complained of was voluntarily discontinued is *prima facie* evidence of want of probable cause, and places upon defendant the burden of showing probable cause. But the suffering of a judgment of *non pros.*, or of a nonsuit, has not the same effect. The mere omission to prosecute a suit does not furnish sufficient ground for an action of malicious prosecution. *Burhans v. Sanford*, 19 Wend. 417.

The mere fact that the plaintiff was acquitted in the former prosecution is not of itself evidence of want of probable cause. *Palmer v. Palmer*, 8 App. Div. 331, 40 N. Y. Supp. 829.

Where the plaintiff did not take the stand as a witness, but merely proved an alibi, and that the defendant did not press the criminal prosecution against him and gave no direct evidence that he was not the person charged by defendant with larceny, it was held that he had failed to prove that the defendant did not have probable cause. *Keating v. Fitts*, 13 App. Div. 1, 77 St. Rep. 124, 43 N. Y. Supp. 124.

The fact that in a former prosecution the plaintiff was acquitted by the jury is not of itself evidence that probable cause did not exist, because the want of probable cause does not depend upon whether the accused was guilty or innocent, but whether the prosecutor had reasonable cause to believe him guilty. *Young v. Lyall*, 23 St. Rep. 215, 57 N. Y. Super. 39, 5 N. Y. Supp. 11.

Where, after the arrest, the defendant altered the charge to one of vagrancy and the plaintiff was detained under such charge, the charge can be justified only by proof that the plaintiff was, as a matter of fact, guilty of the offense, and if the evidence upon this fact is conflicting and the plaintiff was acquitted, the jury in a civil action was justified in finding want of probable cause and the complaint should not be dismissed. *Francis v. Tilyou*, 26 App. Div. 340, 83 St. Rep. 799, 49 N. Y. Supp. 799.

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In *Kutner v. Fargo*, 34 App. Div. 319, 88 St. Rep. 332, 54 N. Y. Supp. 332, it was stated that the plaintiff must prove something more than his innocence. He is bound affirmatively to show want of probable cause. The court said: "There may doubtless be acts where the plaintiff knows nothing of the facts and circumstances upon which the arrest was procured. There may even be cases where he can ascertain nothing upon that head, and where the bald fact of his arrest, coupled with the circumstances attending it, may suffice, *prima facie*, to show a want of probable cause. But that is not this case." It was held that the circumstances upon which the defendant acted were known to the plaintiff, and he merely put in evidence the indictment; he had failed to show want of probable cause.

Where the prosecution complained of was the arrest of the debtor on the ground of obtaining goods upon false representations, and where it was shown that the plaintiff, on applying for credit, represented that his property consisted of certain real estate and referred to the records of the county clerk's office as records of ownership, which representation was true,—*Held*, that want of probable cause was shown, notwithstanding that the defendant on searching had failed to discover the evidences of plaintiff's title. *Grinnel v. Stewart*, 32 Barb. 544, 12 Abb. Pr. 220, 20 How. Pr. 478.

If the suspicious circumstances which led to plaintiff's arrest might have been explained by proper investigation, the omission to make such investigation is evidence of absence of probable cause. *Scott v. Dennett Surpassing Coffee Co.*, 51 App. Div. 321, 98 St. Rep. 1016, 64 N. Y. Supp. 1016.

Where the charge for which the plaintiff had been prosecuted was larceny of some boards, testimony to show that no demand for the return of the boards had ever been made was held to be admissible as bearing upon the question of want of probable cause, and also upon the question of malice. *George v. Johnson*, 25 App. Div. 125, 83 St. Rep. 203, 49 N. Y. Supp. 203.

Where the plaintiff, a plumber, had been arrested on defendant's complaint for forcibly removing plumbing from defendant's building, for which payment had been refused, it was held that not only did the evidence show a probable cause, but the existence of a *real cause*. *Anderson v. How*, 116 N. Y. 336. See this case limited in *Wass v. Stephens*, 128 N. Y. 129.

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The defendant may show both absence of malice and the existence of probable cause, and no evidence pertinent to either of these should be excluded. *McKown v. Hunter*, 30 N. Y. 628.

"The law so far encourages criminal complaints as to protect the complainant against a civil action for damages in case the criminal proceeding, fairly conducted, results in the conviction of the person charged with a crime. Such conviction, fairly obtained without fraud or duress, is held to be conclusive evidence of probable cause. *Robbins v. Robbins*, 133 N. Y. 598, 28 Abb. N. C. 256, 44 St. Rep. 684, affirming 39 St. Rep. 453, 15 N. Y. Supp. 215.

The fact that the defendant was informed by his watchman that the plaintiff had twice attempted to break into defendant's bathhouse proves probable cause for the arrest of the plaintiff. *Francis v. Tilyou*, 26 App. Div. 340, 83 St. Rep. 799, 49 N. Y. Supp. 799.

Where the prosecution complained of was procuring an indictment of the plaintiff for obtaining goods by false pretenses,—*Held*, that evidence that the plaintiff had been guilty of conduct which to a man unversed in the technical rules of law would excite a well-grounded suspicion that a crime had been committed, was sufficient to work protection for the defendant on the ground that probable cause existed. *Baldwin v. Weed*, 17 Wend. 224.

Probable cause being a defense, the exclusion of evidence on the part of the defendant to show probable cause is error. *Marks v. Townsend*, 97 N. Y. 597.

On the question of probable cause the inquiry is not limited the facts within the prosecutor's knowledge, but information given to him by others may be shown. *Owen v. New Rochelle Co.*, 38 App. Div. 53, 89 St. Rep. 913, 55 N. Y. Supp. 913.

In an action for malicious prosecution, which consisted in charging the plaintiff with having poisoned chickens, and where the defendant having employed a person to investigate the matter, was asked what was the conversation this person said he had with the plaintiff, and where the question was excluded as hearsay. *Held* error; that the testimony was competent as tending to show the impression made upon the defendant's mind and the materials he had before him in forming an opinion, and properly bore upon the question as to whether the defendant had reasonable ground to believe that the plaintiff was guilty of the offense charged. *Eng-*

## Art. 8. Evidence.

*lish v. Major*, 59 Hun, 317, 36 St. Rep. 69, 12 N. Y. Supp. 935, citing 2 Addison on Torts, 766; *Miller v. Milligan*, 48 Barb. 30-47; *Bacon v. Towne*, 4 Cush. 217-240; *Lamb v. Galland*, 44 Cal. 609.

For a case where the finding of the jury of want of probable cause was held warranted by the evidence, see *Humphrey v. Prudential Ins. Co.*, 41 St. Rep. 453, 16 N. Y. Supp. 480.

Evidence tending to show that the defendant did not believe plaintiff guilty of stealing articles, and was aware of the fact that the plaintiff claimed to own them, and that the object of the prosecution was to compel plaintiff to return the property, was held to warrant the jury in finding want of probable cause. *Sayles v. Hoezel*, 48 St. Rep. 205, 20 N. Y. Supp. 553.

Where the defendant, a police officer, charged with maliciously arresting the plaintiff, had previously arrested a disorderly person whom the plaintiff had ejected from a saloon, and who subsequently, without knowledge of the facts, made a complaint and obtained the plaintiff's arrest,—*Held*, that the question of lack of probable cause was properly submitted to the jury. *Connelly v. McDermott*, 3 Lans. 63.

Where the plaintiff testified that the defendant had authorized him to indorse defendant's name upon a note and pay it to the defendant, and where the testimony was corroborated, though denied by the defendant,—*Held*, that the jury were justified in finding want of probable cause and malice. *School v. Schnebel*, 29 St. Rep. 676, 8 N. Y. Supp. 855.

Where the complaint in a former action contained an offensive charge, which was injurious to defendant's character,—*Held*, in an action of malicious prosecution, not to be erroneous for the judge to present the two theories of the case presented by opposing parties, to the jury, leaving them to say whether the offensive charge was necessary to the action, or was merely a cover for malicious purposes in destroying the plaintiff's character. *Shafer v. Loucks*, 58 Barb. 426.

Evidence as to advice of counsel is inadmissible in the absence of proof that it was given after a full and fair statement of the case had been made. *Davidoff v. Wheeler & Wilson Co.*, 16 Misc. Rep. 31, 37 N. Y. Supp. 661, 73 St. Rep. 280, affirming 14 Misc. Rep. 456, 70 St. Rep. 742, 35 N. Y. Supp. 1019.

The fact that the defendant proceeded on advice of counsel in

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instituting the prosecution does not, of itself, warrant finding that there was probable cause. *Scott v. Dennett Surpassing Coffee Co.*, 51 App. Div. 321, 98 St. Rep. 1016, 64 N. Y. Supp. 1016.

*Bona fide* acts of a party done on advice given by counsel after full and fair statement of the facts is evidence of probable cause, however erroneously made. *Richardson v. Virtue*, 2 Hun, 211, 4 T. & C. 441.

Where plaintiff was arrested and removed from his house, and his request to be taken before a judge refused, as also his request for counsel, and where, in an insufficient examination by physicians, he was taken to an insane asylum,—*Held*, that there was sufficient evidence to support verdict of jury that the case was malicious. *Silkman v. Crosby*, 14 St. Rep. 563.

Evidence that a police magistrate entertained a complaint in a criminal prosecution; issued a warrant for the arrest of plaintiff; that plaintiff waived preliminary examination; that he was subsequently indicted, and that upon the trial the question of his guilt was submitted to the jury, and that the jury deliberated for some time before arriving at a verdict of acquittal, constitutes, at the most, only *prima facie* evidence of probable cause. Thus the court was correct in refusing to charge that these facts constituted conclusive evidence of probable cause. *Stevens v. Metropolitan Ins. Co.*, 2 Misc. Rep. 584, 51 St. Rep. 575, 21 N. Y. Supp. 1024.

For a case where a nonsuit was sustained, there being no proof of malice or want of probable cause, see *Richard v. Boland*, 5 Misc. Rep. 552, 26 N. Y. Supp. 57.

See *Wass v. Stephens*, 6 N. Y. Supp. 131, for a case where the plaintiff was arrested for improperly cutting away pipe. The court said: "If the work was done in a proper manner there was no probable cause for the arrest. The jury have found the cutting properly made, and under such a finding no ordinarily prudent man could suppose there was a criminal offense committed by the plaintiff. He was doing his duty under orders of a superior." s. c. on appeal 128 N. Y. 123.

## SUBDIVISION 2.

## Of Malice.

It is not necessary to show that the act complained of was prompted by angry feeling or vindictive motive. Malice may be and usually is inferred from want of probable cause. *Burhans v. Sanford*, 19 Wend. 417.

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In malicious prosecution it is proper to show on the question of malice that at a time prior to the commencement of the action the defendant had made a second attempt to indict the plaintiff, although the action is based upon the previous attempt stated in the complaint. Also where the defendant was manifestly engaged in attempting to use criminal process to enforce a civil debt. *Held* to be competent to show what his agent said and did in carrying out his instructions. *Reynolds v. Haywood*, 77 Hun, 131, 59 St. Rep. 47, 28 N. Y. Supp. 467.

Where the defendant corporation had plaintiff, its cashier, arrested on a charge of embezzlement,—*Held*, that proof that pending the criminal proceeding the secretary told the accused that there had been a little mistake and that they would withdraw the charge if he would release them, is competent upon the question of malice, and of the secretary's authority, and as part of the *res gestæ*. *Scott v. Dennett Surpassing Coffee Co.*, 51 App. Div. 321, 98 St. Rep. 1016, 64 N. Y. Supp. 1016.

The defendant is at liberty to show absence of malice and the existence of probable cause, and no evidence pertinent to either of these issues should be excluded where it is charged that the defendant had maliciously made complaint against the plaintiff on a charge of perjury. It was held that the defendant should have been allowed to testify as to whether he believed the evidence given by the plaintiff was material, and whether he believed, at the time he made the complaint against plaintiff for perjury, that he was guilty of the charge; that it was error to exclude this testimony. *McKown v. Hunter*, 30 N. Y. 628.

Where the prosecution complained of was the appearance of the defendant before grand jury, causing an indictment to be found against the plaintiff; and where in an action for malicious prosecution the plaintiff had shown that the defendant appeared before the grand jury,—*Held* to be error to exclude defendant's offer to show what he said and did before them. It was open for him to show that he testified to the plaintiff's own version of the transaction. This evidence went to the very gist of the action and bore upon the question of malice. *Avery v. Blair*, 20 Abb. N. C. 259, 105 N. Y. 669, reversing 21 Week. Dig. 178.

Where a corporation is sued for malicious prosecution the president, who was the prime mover in the prosecution, may testify on behalf of the defendant as to his motive for having the plaintiff

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arrested. Such testimony is competent to show absence of malice. *Schwarting v. Van Wie N. Y. Grocery Co.*, 60 App. Div. 475, 103 St. Rep. 978, 69 N. Y. Supp. 978.

Under the rules of evidence as established in this State, the defendant in an action for malicious prosecution is competent to testify whether or not he was prompted by ill-will and malice in prosecuting the plaintiff. He should be permitted to answer such question. *MacCormack v. Perry*, 47 Hun, 71, overruling *Lawyer v. Loomis*, 3 T. & C. 396.

Where the defendant, a police officer, had made a complaint against the plaintiff and caused his arrest, having full knowledge of the facts, it was held error to exclude evidence offered by the defendant, that he had acted upon statements made to him as an officer. This is so, although the defendant himself was present. *Connelly v. McDermott*, 3 Lans. 63.

For a case where a judgment was reversed because of the admission of improper testimony, which might have operated on the minds of the jury on the question of malice, see *Le Roy v. Claus Lipsius Co.*, 33 App. Div. 571, 87 St. Rep. 925, 53 N. Y. Supp. 925.

The jury may infer malice from lack of probable cause, but are not bound to do so. *Langler v. East River Gas Co.*, 41 App. Div. 470, 92 St. Rep. 992, 58 N. Y. Supp. 992.

For a case where it was held that the evidence made a question for the jury on question of malice and want of probable cause, and where it was not error to refuse nonsuit, see *Grout v. Cottrell*, 50 St. Rep. 829, 22 N. Y. Supp. 336.

For a case where the evidence was held to warrant a finding of malice, see *Manasha v. Royal Benefit Society*, 21 Misc. Rep. 474, 81 St. Rep. 628, 47 N. Y. Supp. 628.

## SUBDIVISION 3.

## Of Character.

It is error to permit the defendant to testify that before he instituted the proceeding he was informed that the plaintiff was one of the worst men his employer knew; that he had been imprisoned; and was one of the biggest crooks in New York city, and had been in trouble elsewhere, etc. *Hart v. McLaughlin*, 51 App. Div. 411, 98 St. Rep. 827, 64 N. Y. Supp. 827. This opinion seems to be based upon the theory that the evidence was hearsay

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as to specific facts and not as to general reputation of plaintiff. It seems to be admitted that proof of the general reputation of the plaintiff would have been competent on the question of probable cause, as well as in mitigation of damages. Citing *Bacon v. Towne*, 4 Cush. 217; *Barron v. Mason*, 31 Vt. 189; 2 Greenl. Ev., § 454.

As to the relevancy of evidence tending to show previous quarrel and assault between same parties, see *Carpenter v. Halsey*, 57 N. Y. 657, affirming 60 Barb. 45.

Where the arrest was for a specific misdemeanor, not involving moral turpitude, affirmative evidence as to the plaintiff's good character should be excluded. *Richard v. Boland*, 5 Misc. Rep. 552, 26 N. Y. Supp. 57.

Evidence is properly excluded which tends to show that at or about the time the defendant had caused the plaintiff's arrest for larceny, he was guilty of an attempted fraud upon defendant utterly disconnected with the alleged crime of which he was accused. *Stevens v. Met. Ins. Co.*, 2 Misc. Rep. 584, 21 N. Y. Supp. 1024.

**SUBDIVISION 4.****Of Damage.**

Under the Code of Civil Procedure, § 536, defendant may prove at the trial facts not amounting to a total defense, tending to mitigate, or otherwise reduce plaintiff's damage, if they are set forth in the answer. This seems to apply to an action for malicious prosecution, and in such action it was held that the defendant may allege in mitigation facts tending to show that what he did was done without malice, and that he had a right to suppose that there was reasonable cause for his action. *Bradner v. Faulkner*, 93 N. Y. 515, reversing 15 Week. Dig. 240.

Where the plaintiff had been convicted by a justice of the peace and committed to the penitentiary he may give evidence of what occurred there, and as to what was done to him there. *Nicholson v. Sternberg*, 61 App. Div. 51, 104 St. Rep. 212, 70 N. Y. Supp. 212.

Evidence of special damage, as damage to the business of an attorney, is not admissible unless specifically pleaded. *Evins v. Metropolitan St. Ry. Co.*, 47 App. Div. 511, 62 N. Y. Supp. 495.

See also as to what elements go to make up damage, "Elements of the Wrong."



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## SUBDIVISION 5.

## Of Results of Former Prosecution.

Where the outcome of a trial of a chief of police before trustees of a village on charges was in question, it was held error to permit such chief of police to testify that he was vindicated, etc. The record itself is the best evidence of this fact. *Duffy v. Bierne*, 30 App. Div. 384, 51 N. Y. Supp. 626, 85 St. Rep. 626.

Proof by the plaintiff that the former prosecution was terminated in his favor is not conclusive evidence of his innocence, and the defendant may prove that the plaintiff was, in fact, guilty. *Barber v. Gould*, 20 Hun, 446.

But, on the contrary, proof of the guilt of the accused is conclusive evidence of probable cause, and if such proof be made no action will be sustained, however plainly malice may be shown, or however improper the motives of the prosecutor. *Turner v. Dinnegar*, 20 Hun, 465.

Where the former prosecution was in an action for moneys had in a fiduciary capacity, and where judgment therein was rendered for the then defendant, the fact was held to be conclusively proved that the defendant in the malicious prosecution action had no cause of action against the then plaintiff, the defendant in the prior suit, and that he had no real ground to cause the plaintiff's arrest in that action. But, nevertheless, the defendant presumably acted in good faith and the burden was thus upon the plaintiff to show want of probable cause. *Hodges v. Richards*, 30 App. Div. 159, 85 St. Rep. 869, 51 N. Y. Supp. 869.

## SUBDIVISION 6.

## Burden of Proof — Miscellaneous.

The burden is upon the plaintiff to show both want of probable cause and malice upon the part of defendant, and unless his evidence establishes both the want of probable cause and malice, the defendant will be entitled to a dismissal of the complaint. *Anderson v. How*, 116 N. Y. 238.

The burden is upon the plaintiff to show affirmatively want of probable cause and malice and to introduce evidence in regard to them from which they may be legitimately inferred; and what-

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ever the plaintiff may prove the defendant is at liberty to disprove. *McKown v. Hunter*, 30 N. Y. 628.

The onus is upon the plaintiff to prove both want of probable cause for the prosecution and malice upon the part of defendant. If he fails to prove either of these facts the action necessarily fails. *Heyne v. Blair*, 62 N. Y. 21.

In this action the burden is on plaintiff to show (1) want of probable cause; (2) malice in defendant; he must prove both of these propositions before he can recover. *Young v. Lyall*, 23 St. Rep. 216, 57 N. Y. Super. 39, 5 N. Y. Supp. 11.

For a case where the judgment was reversed on account of the admission of irrelevant matter calculated to work upon the sympathies of the jury, see *Grout v. Cottrell*, 143 N. Y. 677, 38 N. E. 717.

Where the plaintiff is arrested on a charge of attempting to abscond and defraud defendant, a hotel-keeper, he should be permitted to testify to a conversation with the defendant's bartender, in the absence of defendant, in which the bartender told plaintiff that if he would go and get the money the bartender would keep the defendant quiet, and that he might take his clothes with him. Such evidence is competent as showing that the plaintiff left the hotel with an honest intention, etc. *Nicholson v. Sternberg*, 61 App. Div. 51, 104 St. Rep. 212, 70 N. Y. Supp. 212.

Where the defendant corporation had caused the plaintiff's arrest on charge of embezzlement, evidence that the proceedings on the trial were conducted under the defendant's secretary's eye and that of the general counsel, who sat with the district attorney, and made some suggestions, is evidence which will warrant finding that the corporation was responsible for the prosecution. *Scott v. Dennett Surpassing Coffee Co.*, 51 App. Div. 321, 98 St. Rep. 1016, 64 N. Y. Supp. 1016.

For a case where the weight of evidence was held to sustain a verdict, see *Davidoff v. Wheeler & Wilson Co.*, 16 Misc. Rep. 31, 37 N. Y. Supp. 661, 73 St. Rep. 280, affirming 14 Misc. Rep. 456, 70 St. Rep. 742.

In an action for malicious prosecution in procuring the arrest of the plaintiff for a felony, it was held that evidence of a settlement between plaintiff and defendant in a former prosecution was not admissible. *Van Voorhes v. Leonard*, 1 T. & C. 148.

A stipulation identifying a certain affidavit as the original upon

## Art. 9. Procedure and Trial.

which a warrant of arrest was issued, and admitting that the plaintiff was arrested upon such warrant, does not authorize the defendant to read such affidavit in evidence. *Hankinson v. Giles*, 29 How. Pr. 478, 17 Abb. Pr. 251.

The complaint and deposition made by defendant to procure the plaintiff's arrest are entitled to greater weight than the testimony of the magistrate as to what the defendant stated when he applied for the warrant. *Sayles v. Hoezel*, 48 St. Rep. 205, 20 N. Y. Supp. 553.

## ARTICLE IX.

## PROCEDURE AND TRIAL.

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## SUBDIVISION 1.

## Trial.

Where the plaintiff was arrested in Queens county on a warrant which had been issued by a justice of the peace in Oswego county, and taken to Oswego county, where he was tried and acquitted, it cannot be said that the cause of action arose in Oswego county so as to entitle defendant to have a change of venue from Queens to Oswego county. *Santoro v. Trimble*, 63 App. Div. 413, 105 St. Rep. 785, 71 N. Y. Supp. 785.

Where the action was brought by a foreign corporation it was held that such corporation could not be a legal resident of the State, although authorized to do business therein, and that the venue was properly changed to the county where the defendant resided. *Shepherd & Morse Lumber Co. v. Burleigh*, 27 App. Div. 99, 84 St. Rep. 135, 50 N. Y. Supp. 135.

## SUBDIVISION 2.

## Charge and Nonsuit.

A request to charge is improper which permits an inquiry as to the actual, as well as the reasonable belief of the prosecuting party at the time of making the complaint. *Davidoff v. Wheeler & Wilson Co.*, 16 Misc. Rep. 31, 37 N. Y. Supp. 661.

As to a charge in a case turning upon the embezzling of partner-

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ship property by one of the partners, see *Griffin v. Keeney*, 27 App. Div. 492, 84 St. Rep. 721, 50 N. Y. Supp. 721.

Where the court charged: "If you find that this defendant made this accusation without any probable cause, and believing it was true, then the plaintiff has made out his case so far as the second branch — that for malicious prosecution — is concerned, because the other elements have been proved," the charge was held to be defective, and to warrant a new trial because the element of malice was left out. *Vorce v. Oppenheim*, 37 App. Div. 69, 89 St. Rep. 596, 55 N. Y. Supp. 596.

Where the court would not be justified in holding as matter of law that the defendant had such reasonable grounds of suspicion, supported by circumstances of such strength as to warrant a cautious man in believing that the plaintiff was guilty of the offense charged, it should not dismiss the complaint at the close of the plaintiff's testimony, nor should it direct a verdict for the defendant at the close of the case, because the defendant's evidence contradicted in substantial respects the evidence on the part of the plaintiff. *De Matteis v. La Maida*, 74 Hun, 432, 57 St. Rep. 178, 26 N. Y. Supp. 471.

Where the court instructed the jury that there was no probable cause for the prosecution, and that such lack of probable cause was evidence of the malice necessary to sustain the action, and that they might find such malice in this fact alone, *Held*, that the charge was correct. It seems that it would have been error to charge that they *must* find malice from such lack of probable cause. The court said: "If there was no probable cause \* \* \* the jury may nevertheless find for the defendant, upon the ground that there was no malice." Citing *Greenl. Ev.*, § 453, note "A." *Brown v. McBride*, 24 Misc. Rep. 236, 86 St. Rep. 620, 52 N. Y. Supp. 620.

Want of probable cause is evidence of malice, but not conclusive. *Brown v. McBride*, 24 Misc. Rep. 236, 86 St. Rep. 620, 52 N. Y. Supp. 620.

Where in an action for malicious prosecution the plaintiff denied that he had done the wrong charged against him in such prosecution, and the only evidence on the trial was that of defendant and his agent, — *Held*, that the question of probable cause did not rest upon undisputed testimony, but that it was a question for the jury. The credibility of defendant's testimony was for

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the jury. *Gierhon v. Ludlow*, 25 St. Rep, 352, 6 N. Y. Supp. 111.

Where there is evidence tending to show the fact that there was an agreement between the parties which authorized the plaintiff to do the act for which the malicious prosecution was commenced, it is proper for the judge to charge the jury that if from the evidence the jury should be of the opinion that there was such an agreement or understanding, that then there was want of probable cause. *Stevens v. Lacour*, 10 Barb. 62.

In an action for malicious prosecution, founded upon the fact that the defendant had charged the plaintiff, his clerk, with embezzling money, the court charged that if the defendant, prior to making the complaint against the plaintiff, settled with him for the moneys claimed to have been embezzled as for moneys had and received, that this would constitute evidence that he did not believe the plaintiff had embezzled the money. *Held* error; that even if the money was embezzled the defendant had a right to settle as upon an implied contract; that such settlement was no bar to a criminal prosecution, and that it was not evidence that the defendant did not believe that the money had been embezzled. *Fagnan v. Knox*, 66 N. Y. 528, 1 Abb. N. C. 246, reversing 40 N. Y. Super. 41.

The jury should be charged as to the rule governing exemplary damages, and its restrictions and limitations, and the question should not be left wholly to their discretion. *Kutner v. Fargo*, 20 Misc. Rep. 207, 79 St. Rep. 752, 45 N. Y. Supp. 752.

Where the defendant had lost money, which was found near a woodpile where the defendant was at work; and where later the defendant, upon hearing that the plaintiff had displayed a large roll of bills, procured a warrant of arrest, although he knew that the plaintiff was engaged on a contract, and that a considerable sum would be paid him about that time,—*Held*, that the court properly refused to charge that the plaintiff could not recover as matter of law; that the case was one for the jury. *Sprague v. Gibson*, 43 St. Rep. 832, 17 N. Y. Supp. 685.

It is error to charge "that the law infers malice when there is want of probable cause." The jury may infer malice from want of probable cause, but it is not an absolute inference of law. *Jennings v. Davidson*, 13 Hun, 393.

Where the only evidence tending to show probable cause is that

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of the defendant and his agent, while the plaintiff testifies that he was not guilty of the charge and is corroborated by others, as well as by the fact of his acquittal, it is error to dismiss the complaint; the question is for the jury. *Giehon v. Ludlow*, 6 N. Y. Supp. 111.

Where the evidence shows facts which led the defendant to believe the guilt of the plaintiff, although he was mistaken, and are not such as to charge him with reaching an erroneous conclusion through failure to exercise ordinary prudence and discretion, a verdict in favor of plaintiff, on the grounds that probable cause was not shown, should be set aside. *Mohar v. Simmons*, 3 St. Rep. 293.

## SUBDIVISION 3.

## Costs.

If the plaintiff recovers less than \$50 damages in an action for malicious prosecution the amount of his costs cannot exceed the damages. Code, § 3228.

For a case where an extra allowance of \$1,000 to the defendant on dismissal of the complaint was held to be excessive, see *Dann v. Wormser*, 38 App. Div. 460, 90 St. Rep. 474, 56 N. Y. Supp. 474.

## ARTICLE X.

## DAMAGE.

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## SUBDIVISION 1.

## Compensatory Damages.

Damages in these cases may be based upon injury to person, to reputation, and to pocket. *Scott v. Dennett, etc., Co.*, 51 App. Div. 321, 98 St. Rep. 1016, 64 N. Y. Supp. 1016.

Where the plaintiff had been sued civilly and his property attached by a corporation of which he had been an officer, it was held that the jury in awarding damages might consider the loss of his office, the actual expenses incurred by the plaintiff in his vindication, any general impairment of his integrity in social and mercantile aspect, and the shame and humiliation endured as a direct result of the publicity of his arraignment upon a charge

## Art. 10. Damage.

injuriously affecting his trustworthiness. A verdict for \$31,700 was sustained, although it was shown that he had spent only \$2,500 expenses for counsel fees in the prior action. *Willard v. Holmes et al.*, 2 Misc. Rep. 303, 21 N. Y. Supp. 998, judgment reversed 142 N. Y. 492.

It is correct to charge that if the jury find for the plaintiff he is entitled to his actual damages at all events. But if they find that the defendant instituted the prosecution in reckless disregard of plaintiff's right, they may find therefrom that degree of malice which will enable them to add smart money to the amount of actual damage. *Brown v. McBride*, 24 Misc. Rep. 236, 86 St. Rep. 620, 52 N. Y. Supp. 620, and cases cited.

Where the plaintiff in an action for malicious prosecution had paid his attorney a fee of \$150 to defend a replevin suit brought by the defendant, he is entitled to recover that item as damage in the malicious prosecution. Where, however, the plaintiff had in the replevin action recovered six cents damages, with costs, the demand for damages for the taking of goods is *res adjudicata*, and cannot be recovered in a subsequent action for malicious prosecution. *Gerken v. Ruppert*, 33 Misc. Rep. 382, 67 N. Y. Supp. 589, 101 St. Rep. 589.

In an action for malicious prosecution the plaintiff may recover for the expenses of his defense in the former action. *Sheldon v. Carpenter*, 4 N. Y. 580.

In an action for malicious prosecution the plaintiff may recover for the injury to his fame and reputation, and this bars an action for slander for the same accusation. *Sheldon v. Carpenter*, 4 N. Y. 580.

If the plaintiff intends to give evidence or particular instances of loss occasioned by the wrongful acts of the defendant, a bill of particulars thereof must be given, and it seems the facts must be pleaded. *Dietz v. Leber*, 33 App. Div. 563, 87 St. Rep. 977, 53 N. Y. Supp. 977.

Evidence of injury to plaintiff's business is not admissible unless such injury has been specially pleaded. So held where plaintiff was an attorney, and where such evidence was introduced upon the theory that it tended to establish "loss of credit and reputation," as alleged in the complaint. *Evins v. Metropolitan Street Ry. Co.*, 47 App. Div. 511, 96 St. Rep. 495, 62 N. Y. Supp. 495.

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In *Johnson v. Comstock*, 14 Hun, 238, a verdict of \$1,000 was held not to be excessive for the malicious issuance of a warrant of search and for searching plaintiff's premises thereunder.

Where the plaintiff had been arrested through mistake, of which the plaintiff was the responsible author, it was held that a verdict of six cents should not be set aside upon the ground of inadequate damages. *Toomey v. D., L. & W. R. R. Co.*, 2 Misc. Rep. 82, 49 St. Rep. 623, 21 N. Y. Supp. 448.

A verdict of \$1,000 was held not to be excessive where the plaintiff was only locked up for half an hour on a charge of forgery. *Thorpe v. Carvalho*, 14 Misc. Rep. 554, 36 N. Y. Supp. 1, 70 St. Rep. 760.

Where the plaintiff had been arrested on a charge of forgery, though the proceedings were subsequently abandoned,—*Held* a verdict of \$1,000 was not excessive. *School v. Schnebel*, 29 St. Rep. 676, 8 N. Y. Supp. 855.

Where plaintiff was discharged without trial, and was put to no expense,—*Held*, nevertheless, that a verdict for \$250 was not excessive. *Sprague v. Gibson*, 43 St. Rep. 832, 17 N. Y. Supp. 685.

**SUBDIVISION 2.****Punitive Damages.**

If the jury find that the defendant instituted the prosecution in wanton and reckless disregard of the plaintiff's rights, they may find therefrom that degree of malice which will warrant smart money, in addition to actual damages. *Brown v. McBride*, 24 Misc. Rep. 236, 86 St. Rep. 620, 52 N. Y. Supp. 620.

A corporation is not liable in exemplary damages for the malicious prosecution by its agents unless such acts were previously authorized or subsequently ratified, and to warrant ratification there must be proof that the principal had knowledge of the agent's malice, or that the circumstances warranted the inference that he believed the agent to have been guilty of the malicious act. *Kutner v. Fargo*, 20 Misc. Rep. 207, 79 St. Rep. 752, 45 N. Y. Supp. 752.

Advice of counsel is material in mitigation of damages, though it cannot mitigate actual damages. The actual damage done to a party cannot be mitigated. *Brown v. McBride*, 24 Misc. Rep. 236, 86 St. Rep. 620, 52 N. Y. Supp. 620.



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Art. 11. Malicious Abuse of Process.

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**ARTICLE XI.****MALICIOUS ABUSE OF PROCESS.**

The text-book writers treat of the distinction between malicious prosecution and abuse of legal process. If the process, either criminal or civil, is willfully made use of for the purpose not justified by the law, it is an abuse for which an action will lie. The following are illustrations: Entering up judgment and suing out execution after demand has been satisfied; suing out attachment for an amount greatly in excess of debt; causing arrest for more than is due; levying execution for an excessive amount. In these cases proof of actual malice is not important, except as it may tend to aggravate damages. It is enough that the process was willfully abused to accomplish some unlawful purpose. Cooley on Torts (2d ed.), 220.

In malicious abuse of process, process which in itself may have been lawful has been perverted to a purpose not contemplated by it. All that is required for the cause of action is proof that the process has been applied to a purpose not named or implied by it to the damage of the plaintiff. Perversion or abuse of the process gives the name "malicious" to the cause. The malice is fictitious or may be such. Bigelow, § 320.

This author adds that it is not necessary for the plaintiff to maintain this action to await the determination of the original proceeding, or to prove that there was no probable cause for the issuance of the particular process.

Malicious abuse of process is distinguished from malicious prosecution in at least two respects. First, in that want of probable cause is not an essential element (*Hazard v. Harding*, 63 How. Pr. 326), and, second, that it is not essential that the original proceeding shall have terminated (*Zinn v. Rice*, 154 Mass. 1). It differs from false imprisonment in that, among other things, a warrant valid on its face is no defense. Hale, 361.

An action lies for malicious abuse of process even if the process were properly issued, is valid in form, and the proceeding was justified and proper in its inception, but injury arises in consequence of the abuse in subsequent proceedings. Hale, 361.

In Webb's Pollock on Torts, note, p. 399. the American editor cites very fully from *Wood v. Graves*, 144 Mass. 366, as to abuse of process, saying that the opinion very concisely and clearly

## Art. 11. Malicious Abuse of Process.

states the law of this action as follows: "There is no doubt that an action lies for the malicious abuse of lawful process, civil or criminal. It is to be assumed in such a case that the process was lawfully issued for a just cause, and is valid in form, and that an arrest or other proceeding upon the process was justifiable and proper in its inception. But the grievances to be redressed arise in consequence of subsequent proceedings. For example, if, after the arrest, upon civil or criminal process, the person arrested is subjected to unwarrantable insults and indignities, is treated cruelly, is deprived of proper food, or is otherwise treated with oppression and undue hardship, he has a remedy by an action against the officer, and against others who unite with the officer, in doing the wrong.

"There is a distinction between a malicious use and a malicious abuse of legal process. An abuse is where the party employs it for some unlawful object, not the purpose it is intended by law to effect; in other words, perversion of it. \* \* \* On the other hand, legal process, civil or criminal, may be maliciously used so as to give rise to a cause of action where no object is contemplated to be gained by it other than its proper effect and execution."

The following authorities are cited to the point: *Johnson v. Reed*, 136 Mass. 423, citing *Page v. Cushing*, 38 Me. 523. See *Peters v. Tunell*, 43 Minn. 459, 45 N. W. 866; *Casey v. Hanrick*, 69 Tex. 44, 6 S. W. 405; *Wood v. Bailey* (Mass.), 11 N. E. 573; *Emery v. Ginnan*, 24 Ill. App. 65; *Cuhady v. Powell*, 35 Ill. App. 29; *Banrett v. Reed*, 51 Pa. St. 190; *Savage v. Brewer*, 16 Pick. 453; *Mayer v. Walter*, 64 Pa. St. 285, followed in *Eberly v. Rupp*, 90 Pa. St. 259; *Juchter v. Boehm*, 67 Ga. 538; *Crusselle v. Pugh*, 71 Ga. 747; *Emerson v. Cochran*, 111 Pa. St. 619; *Smith v. Weeks*, 60 Wis. 94.

In cases where the process is valid, an officer may still render himself liable for its abuse; a judicial officer may sometimes become liable for malicious abuse of legal process, as where they employ it for some unlawful object, not being the object for which it was intended by law. Newell on Malicious Prosecution, §§ 67, 78, citing *Berrier v. Morehead*, 22 Nebr. 687, 36 N. W. 118; *Page v. Cushing*, 38 Mo. 523; Mechem on Public Officers, § 771; *Mayer v. Walter*, 64 Pa. St. 283, sustains the language of the extracts from *Slomer v. People*, 25 Ill. 70; *Green v. Rumsey*, 2 Wend. 611; *Hackett v. King*, 6 Allen, 59.

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Art. 11. Malicious Abuse of Process.

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In *Holley v. Mix*, 3 Wend. 351, it was held that false imprisonment will lie against an officer and the complainant in a criminal prosecution where they combine and extort money from a party accused by operating upon his fears, although the party be in the custody of the officer, under a valid warrant, issued upon a charge of felony. In note to that case, it is said that one who abuses the authority in fact does not become thereby a trespasser *ab initio*; but otherwise, if he abuse an authority in law, citing *Van Brunt v. Schenck*, 13 Johns. 414; *Allen v. Crofoot*, 5 Wend. 506; *Dumont v. Smith*, 4 Den. 319; *Carrick v. Myers*, 14 Barb. 9.

As to when one becomes a trespasser *ab initio*, see "*The Six Carpenters' Case*," 8 Coke, 290.

Entering up judgment and suing out execution after a demand is satisfied is malicious abuse of process. *Barnett v. Reed*, 51 Pa. St. 190.

Levying execution for an excessive amount is malicious abuse of process. *Sommer v. Wilt*, 4 S. & R. 19; *Churchill v. Siggers*, 3 El. & Black. 929.

Suing out an attachment for an amount greatly in excess of the debt is malicious abuse of process. *Savage v. Brewer*, 16 Pick. 453; *Moody v. Detsch*, 85 Mo. 237.

An abuse of a lawful arrest is also false imprisonment, as cruelly treating the arrested person, insulting him, depriving him of proper food, imposing on him undue hardships, extorting money from him, or doing to him any other like wrong not within the process. Bishop, § 210.

In *Baldwin v. Weed*, 17 Wend. 224 (233), an action was brought for malicious prosecution, which, it was held, could not be sustained upon the process governing that action. Nelson, Ch. J., in so holding, expresses the view that an action for trespass, assault, and false imprisonment should have been brought and was the proper remedy for excess of authority and abuse of process. Citing *Rodgers v. Brewster*, 5 Johns. 125, which is in turn cited in *Blakeley v. Weaver*, 46 Hun, 174 (175), to the point that, while reasonable intendments may go in support of official purposes and acts of ministerial officers, they will be chargeable for an abuse of their authority in the execution of process which results in unreasonable and unnecessary oppression or prejudice to the persons against whom, or against whose property, it is issued. Citing also *Platt v. Sherry*, 7 Wend. 236.

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Art. 11. Malicious Abuse of Process.

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In the latter case it is said that, for maliciously and unreasonably executing process, with intent to oppress, for keeping property in an unsafe place upon execution, and exposing it to destruction, and in numerous other instances, the only remedy is at common law. Citing *Jenner v. Joliffe*, 9 Johns. 381.

Where the process of the court is illegally and wrongfully used to compel the surrender of property or rights, the right of action accrues to the party injured. *Hazard v. Harding*, 63 How. Pr. 327.

In *Brown v. Feeter*, 7 Wend. 301, it was held that an action lies against a party who wrongfully and willfully takes out an execution under a judgment, which he knows to be paid and satisfied, whereby the property of the defendant is taken and sold, and to support the action it is not necessary to allege and prove actual malice.

If cruelty, malice, or oppression appear to have governed or aggravated the imprisonment, they shall not cover themselves with a thin veil of legal forms, nor escape under a cover of a justification the most technically regular. 1 T. R. 536; Esp. Dig. 323. Classed as a principle from this case that, "though the original arrest may be warrantable, yet for any subsequent oppression or cruelty an action lies." Cited *Doyle v. Russell*, 30 Barb. 300 (305).

In *Bebinger v. Sweet*, 1 Abb. N. C. 263, it is held that a complaint alleging that defendant led plaintiff into making a hard and unconscionable lease, and then, after plaintiff had sown crops, etc., turned him off and procured his arrest on a malicious charge of embezzlement and took possession of his household goods, and that all these acts were in pursuance to defendant's plan to damage plaintiff, states facts sufficient to constitute a cause of action for abuse of process.

Neither a judgment creditor nor an officer is justified in using the process of the court aggressively to the injury of the debtor or any third person. A party who directs and the officer who makes the oppressive levy is responsible for the unlawful act; although there be no actual corruption or intentional fraud on the part of the sheriff, under such circumstances, yet, if he abuse his trust, he is answerable therefor. *Cantine v. Clark*, 41 Barb. 629.

It is an abuse of the process of the court to issue execution upon a satisfied judgment, and seek to enforce the same by levying upon

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and selling the property of the defendant. *Swann v. Saddlemeyer*, 8 Wend. 76, cited *Buffalo Lubricating Oil Co. v. Everest*, 30 Hun, 586.

In *Dishaw v. Wadleigh*, 15 App. Div. 206, 44 N. Y. Supp. 207, 78 St. Rep. 207, in opinion Herrick, J., the authorities, with reference to abuse of process, are collated and considered. The conclusion arrived at is that, if legal process is willfully made use of for a purpose not justified by law, it is an abuse for which an action will lie. In such an action it is not necessary that the plaintiff should allege or prove that the proceeding complained of has terminated. So held where the defendant caused a subpoena and attachment to be issued, not for the purpose of procuring the attendance of the plaintiff as a witness in the former case, but, under the idea that such claim was small, he would pay it rather than submit to the discomfort and expense of attending court at a great distance from his residence. *Held*, that such a use of subpoenas was a perversion and abuse of process of the court, and calculated to bring the administration of justice into reproach and contempt. Same case, 4 N. Y. Annot. Cas. 170, followed by note on "Actions for Abuse of Process."

An officer may also become liable for arresting or holding a person under process which has, for any reason, become void, as in *Davis v. Bowe*, 118 N. Y. 55, where it was held that, where a judgment was paid and discharged of record, and the sheriff received without objection an order to discharge the judgment debtor, who is out on bail and subsequently rearrested, he was liable for false imprisonment.

## CHAPTER XIV.

### FALSE IMPRISONMENT.

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#### ARTICLE I.

##### DEFINITIONS AND DISTINCTIONS.

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##### SUBDIVISION 1.

###### Definitions.

To constitute the injury of false imprisonment there are two points requisite: *First*, the detention of the person; *second*, the unlawfulness of such detention. Every confinement of the person is imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets. 3 Bl. Comm. 127.

“Freedom of the person includes immunity not only from the actual application of force, but from every kind of detention and restraint not authorized by law.” Any application of such restraint constitutes the wrong of false imprisonment; which, though

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generally coupled with assault, is nevertheless a distinct wrong. Pollock, 188.

False imprisonment is the unlawful and total restraint of the liberty of the person. Hale, 243.

False imprisonment may be defined most simply and clearly as any unlawful detention of the person. 12 Am. & Eng. Encyc. of Law (2d ed.), 721.

False imprisonment is trespass committed by one man against the person of another by unlawfully arresting him and detaining him without lawful authority. 3 Wait's Action and Defenses 305, citing *Crowell v. Gleason*, 10 Me. 325; *Coulter v. Lower*, 35 Ind. 285.

Though it has been held in England that to obstruct one's way so as to prevent him from passing in another direction was not false imprisonment, still it seems to have been regarded as an actionable wrong. See *Bird v. Jones*, 7 Q. B. 742.

False imprisonment is the unlawful restraint of a person contrary to his will either with or without process of law. *Thorp v. Carvalho*, 14 Misc. Rep. 554, 36 N. Y. Supp. 1, 70 St. Rep. 760. Citing 7 Am. & Eng. Encyc. of Law, 61.

Any actual seizing or touching of, or interfering with the person which, if not justified, will amount to a trespass, will sustain an action of false imprisonment. *Shuley v. Muley*, 14 Week. Dig. 384.

A definition of false imprisonment, together with the elements which constitute the wrong, will be found in the charge of Giegerich, J., in *Limbeck v. Gerry*, 15 Misc. Rep. 663, 39 N. Y. Supp. 95. "False imprisonment is the unlawful restraint of a person contrary to his will, either with or without process of law. It is a trespass to the person, committed by one against another, by unlawfully arresting and detaining him against his will; a direct wrong or illegal act in which the defendant must have participated, or the act must have been of his direct or indirect procurement. Two things are requisite in order to constitute the offense: *First*, detention of the person; *second*, the unlawfulness of such detention. A pure, naked, unlawful detention, unaffected by any question of motive or purpose, constitutes false imprisonment. The want of lawful authority is an essential element of the offense; malice is not."

A husband who has procured an absolute divorce from his wife,

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which awards him custody of the children, is nevertheless liable for false imprisonment for having his former wife arrested on her refusing to give up a child of whom she had obtained possession. The court says: "He could have taken the child by force, if the decree allowed, in a gentle manner; but he could not arrest the plaintiff because she refused to voluntarily give up the child." *Monjo v. Monjo*, 53 Hun, 145, 6 N. Y. Supp. 132.

An assistant clerk at a police station was held to be justified in ordering the temporary removal of a person arrested from the courtroom if the orderly proceedings of the court required it, even if done without the direction of the court or its officer. *Hopner v. McGowan*, 116 N. Y. 405.

An action in the name of an illegitimate child will lie against its putative father for false imprisonment where he wrongfully and fraudulently obtained possession of the child and retained possession of it, because he has no right to the custody of the child as against its mother. *Robalina v. Armstrong*, 15 Barb. 247.

By virtue of section 3343, subdivision 9, of the Code of Civil Procedure, the term "personal injury" includes false imprisonment.

**SUBDIVISION 2.****Distinguished from Malicious Prosecution.**

There is much confusion in the authorities in distinguishing between false imprisonment and malicious prosecution, and they are frequently united in the cases. See *Perry v. Sutley*, 18 N. Y. Supp. 633; *Brown v. Chadsey*, 39 Barb. 262; *Warren v. Dennet*, 17 Misc. Rep. 86, 39 N. Y. Supp. 830, criticised in 12 Am. & Eng. Encyc. of Law (2d ed.), 731. But the distinction between the two is radical. Thus in *Hobbs v. Ray*, 18 R. I. 84, it was said: "These actions are quite distinct and different from each other. The action of trespass for false imprisonment lies for the arrest, or some other similar act, of the defendant which, upon the stating of it, is clearly illegal; while malicious prosecution, on the contrary, lies for a prosecution which, upon the stating of it, is manifestly legal."

The nature of malicious prosecution was thus stated in *Colter v. Lower*, 35 Ind. 285, 9 Am. Rep. 735: "If the imprisonment is under legal process, but the action has been commenced and carried on maliciously and without probable cause, it is malicious



## Art. 1. Definitions and Distinctions.

prosecution. If it has been extra-judicial, without legal process, it is false imprisonment."

It seems that one of the distinctions between action of false imprisonment and action for malicious prosecution is that in the latter proof of actual malice is vital to the support of the action and not merely on the question of damages. See opinion in *Von Latham v. Libbey*, 38 Barb. 343.

In *Warren v. Dennitt*, 17 Misc. Rep. 87, 39 N. Y. Supp. 830, the court thus distinguishes the elements which underlie the two actions: "In the one (action) for false imprisonment, the plaintiff must show that the defendant had him imprisoned or deprived him of his liberty, and that the mode or process was unlawful — *i. e.*, without due process of law. He must prove want of probable cause and malice is presumed. The defendant may, however, disprove malice. In an action for malicious prosecution the plaintiff must prove that the process was regular and the arrest under it lawful, or by lawful authority acting for itself, and must also prove want of probable cause and that the same was malicious. Here malice is not presumed, but must be proven." Although the causes of action may be joined. *Marks v. Townsend*, 97 N. Y. 590.

And in *Cunningham v. East River El. Light Co.*, 60 N. Y. Super. 282, 17 N. Y. Supp. 372, the distinction between false imprisonment and malicious prosecution was stated as follows: "It is well settled that the material allegations in a complaint in an action for false imprisonment, as distinguished from one for malicious prosecution, are that the defendant had the plaintiff imprisoned, and that the process was unlawful; *i. e.*, without authority of law.

The action cannot be maintained where the process was regular and the arrest under it lawful. See *Ackroyd v. Ackroyd*, 3 Daly, 38; *Marks v. Townsend*, 97 N. Y. 590; *Nebenzahl v. Townsend*, 61 How. Pr. 353.

Where the power to arrest exists an action for false imprisonment will not lie. The party must sue for malicious prosecution. *Christie v. Bergh*, 15 Abb. Pr. (N. S.) 51.

In *Sleight v. Ogle*, 4 E. D. Smith, 445, and *Waldheim v. Sichel*, 1 Hilt. 45, it was held that an action for false imprisonment does not lie where the arrest was upon legal process. If such arrest was without probable cause the proper remedy is for malicious prosecution.

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See *Thorp v. Carvalho*, 14 Misc. Rep. 554, 36 N. Y. Supp. 1, 70 St. Rep. 760, for a statement of the distinction between malicious prosecution and false imprisonment, and the various elements which must be shown to sustain this action.

In *Brown v. Chadsey*, 39 Barb. 261, the court distinguishes between the action for false imprisonment and malicious prosecution. These two classes of wrongs and remedies require different rules, although the pleading and evidence are not essentially distinct. In an action for false imprisonment the gist of the action is unlawful detention. Malice in the defendant will be inferred so far, at least, as to sustain the action, and the only bearing of evidence to show or disprove actual malice is upon the question of damages. \* \* \* In the action for malicious prosecution, on the other hand, it is not necessary that the prosecution or the arrest should have been unlawful or unjustifiable upon its face; but it must have been malicious and without probable cause. Malice and want of probable cause are the gist of the action and must be both stated and made out. See opinion in this case at pages 261-263, for an excellent discussion of the distinctive features of the two actions.

In *Farnam v. Fealey*, 56 N. Y. 453, the court distinguishes between false imprisonment and malicious prosecution as follows: "If in this action the defendant had no such direct agency in the original arrest of the plaintiff as to make him liable in an action for false imprisonment, the action may be maintained as one in the nature of malicious prosecution, if the subsequent arrest upon the warrant issued by a magistrate was instigated by him maliciously and without probable cause." And the court then adopts the distinction between the two forms of actions as stated by Ashhurst, J., in *Morgan v. Hughes*, 2 T. R. 114, as follows: "Where the immediate act of imprisonment proceeds from the defendant the action must be trespass, and trespass only; but where the act of imprisonment by one person is in consequence of information from another, then action on the case is the proper remedy, because the injury is sustained in consequence of the act of that other. To support the action for malicious prosecution where the arrest was made upon a warrant issued by a magistrate having jurisdiction to issue it, it must appear that the prosecution was instigated by the defendant and the onus is upon the plaintiff to show that the defendant was the prosecutor and that the prosecution was

## Art. 2. Remedies.

without reasonable or probable cause." See also *Burns v. Erhen*, 40 N. Y. 463.

An action for false imprisonment cannot be maintained where the power to make the arrest existed, and if such power is exercised without probable cause and with malice the proper remedy is action for malicious prosecution. *Stage Horse Cases*, 15 Abb. Pr. (N. S.) 51.

Where the plaintiff joined actions for false imprisonment and malicious prosecution, and the court refused to dismiss the complaint as to the latter, and the jury found for the defendant thereon, it was held that it was so distinct from the other cause of action that the jury was not prejudiced by the ruling. *Thorne v. Turck*, 18 Week. Dig. 550, s. c., 94 N. Y. 90.

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## REMEDIES.

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## SUBDIVISION 1.

## Criminal Action.

Like many other personal injuries false imprisonment may give rise to criminal as well as civil action. See §§ 119, 168, 556, of Penal Code. The last section is, in substance, as follows: "A public officer, or a person pretending to be such, who unlawfully and maliciously, under pretense or color of official authority, (1) arrests another or detains him against his will \* \* \* is guilty of a misdemeanor."

## SUBDIVISION 2.

## Habeas Corpus.

For false imprisonment there are three possible means of relief: (1) A criminal action where allowed by criminal statutes; (2) proceedings in *habeas corpus*; (3) civil action for damages. In former times there were four writs by which one may be re-

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stored to his liberty after false imprisonment (see 3 Bl. Comm. 128). But all are now obsolete save *habeas corpus*.

*Habeas corpus* is to end the imprisonment and regain liberty (see 1 Fiero on Special Proceedings [2d ed.], 57); and is a special proceeding. The civil action is to recover damages for the wrong and lies whether the *habeas corpus* has been brought or not.

The custodian of a prisoner who is discharged upon *habeas corpus* has no interest in the subject-matter and would not be compromised in a future action for false imprisonment. The decision in *habeas corpus* would not bind him. *Matter of Quinn*, 2 App. Div. 104, 37 N. Y. Supp. 534, 73 St. Rep. 149.

**SUBDIVISION 3.****No Injunction Granted.**

In *Davis v. American Society, etc.*, 75 N. Y. 362, it was held that an equitable action will not lie to restrain an officer of a society for the prevention of cruelty to animals from making an arrest for a violation of the statute. The question whether there has been a violation of such statute cannot be determined in an equitable action. The guilt of a person accused of a crime is to be determined in a common-law court by a jury.

**SUBDIVISION 4.****Jurisdiction.**

By virtue of section 2863, subdivision 3, of the Code, a justice of the peace cannot take cognizance of a civil action where it is brought to recover damages for false imprisonment.

A civil action for false imprisonment is not included within the statutory jurisdiction of the municipal courts of city of New York. See Code, § 3215. Nor of The City Court of Albany or Troy. See Code, § 3223.

As regards the jurisdiction of the courts of the city and county of New York over territory in the lower bay, which constitutes the county of Kings, under the Consolidation Act (Laws of 1882, chap. 410), see *Midford v. Kann*, 32 App. Div. 228, 52 N. Y. Supp. 995.

By virtue of section 317, subdivision 2, Code of Civil Procedure, the City Court of New York has jurisdiction in an action in favor of or against a person "belonging to or on board of a vessel in the merchant service to recover damages for false im-

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Art. 2. Remedies.

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prisonment committed on board the vessel, upon the high seas, or in a place without the United States. But this section does not confer upon the City Court authority to proceed as a court of admiralty or maritime jurisdiction." Note that section 3187, applicable to proceedings in certain marine cases, provides that the article does not prevent plaintiff from commencing and conducting in the ordinary manner an action for a cause specified in section 317, subdivision 2.

The Supreme Court has jurisdiction and is bound to entertain an action for false imprisonment between residents of the State for imprisonment by the plaintiff in a foreign country. *Tupper v. Morin*, 25 Abb. N. C. 398, 12 N. Y. Supp. 310, distinguishing *Burdick v. Freeman*, 10 St. Rep. 756, cited 61 App. Div. 342.

There are many statutes relating to both civil and criminal actions bearing upon the legality or illegality of the imprisonment. These various statutes must, of course, be consulted by the practitioner when a case of false imprisonment arises under them. For instance, the duration of the imprisonment of a person convicted under civil process is limited by section 111 of Code of Civil Procedure. There can be no imprisonment for money due on interlocutory costs. § 15. The time of arrest in justices' courts is limited. § 2900. See, generally, sections of Code relating to Imprisonment for Contempt; Discharge of Judgment Debtor; Discharge from Execution against Person, etc.

**SUBDIVISION 5.****Statute of Limitations.**

By provisions of section 384 of the Code of Civil Procedure an action for false imprisonment is among those which must be commenced within two years.

The action of false imprisonment is barred in two years. *Hurlehy v. Martin*, 31 St. Rep. 471, 10 N. Y. Supp. 92.

Where the tort is continuing the right of action is also continuing. Moak's Underhill on Torts, 69, citing *Whitehouse v. Fellowes*, 10 C. B. (N. S.) 765. This very continuance of the imprisonment *de die in diem* is a new imprisonment, and, therefore, the bar of limitation commences to run from the last, and not from the first, day of the imprisonment. Moak's Underhill on Torts, 69, citing *Hardy v. Ryle*, 9 B. & C. 608.

Where the plaintiff alleged that he was confined in an insane

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asylum pursuant to a conspiracy between defendants, he does not thereby enlarge the scope of the action and make applicable a different rule of limitations than that which applied to the action of false imprisonment. Such action is governed by the two years' limitation and not by the six years' limitation applicable to an action for personal injury where no other period of limitation is prescribed. *Oakes v. Oakes*, 55 App. Div. 576, 101 St. Rep. 427, 67 N. Y. Supp. 427.

It should be noted that the arrest once at an end the statute begins to run. In *Dusenbury v. Kielly*, 58 How. Pr. 286, it was said: "The action for false imprisonment accrues the instant the imprisonment takes place and becomes complete the moment the imprisonment ceases." This case was affirmed in 85 N. Y. 383. In this case the warrant on which the arrest was made was dismissed, vacated, and set aside although the proceedings were continued. The court held that the statute began to run at the termination of the imprisonment, and that the subsequent proceedings did not amount to a continuance of the original imprisonment. "If the proceedings continued the imprisonment continued." Again, in *Van Ingen v. Snyder*, 24 Hun, 81, it was held that the right of action began when the imprisonment ceased, citing *Dusenbury v. Kielly*, *supra*.

**SUBDIVISION 6.****Survival and Assignment.**

By virtue of section 1910, subdivision 1, Code of Civil Procedure, an action to recover damages for personal injury cannot be transferred, and by virtue of section 3343, subdivision 9, an action for false imprisonment is included among those actions for personal injuries.

As to assignment of an action for false imprisonment, see *Chapman v. Dyett*, 11 Wend. 33.

By directing the illegal issuance of a body execution a creditor becomes a joint tortfeasor with his attorney, and the assignment by the plaintiff to him of the claim against the attorney in consideration of the discharge of the original judgment also discharges the attorney. The court says: "The law will not permit the principal tortfeasor to buy and enforce against his subordinates claims for damages occasioned by his instructions." *Baker v. Secor*, 22 St. Rep. 97, 4 N. Y. Supp. 303.

## Art. 3. Elements of the Wrong.

## ARTICLE III.

## ELEMENTS OF THE WRONG.

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## SUBDIVISION 1.

## Malice not Essential.

One of the features distinguishing false imprisonment from malicious prosecution is that in the former, malice is not necessary. For example, it is false imprisonment where an officer, though in good faith, arrests the wrong person. See *Price v. Harwood*, 3 Campb. 108. So, too, where the right person is arrested, but the warrant describes him by the wrong name. *Scott v. Ely*, 4 Wend. 555; *Gurnsey v. Lovell*, 9 Wend. 319.

At common law trespass, not case, lay for false imprisonment. Accordingly, liability proceeded, not on the theory of evil motive or of negligence, but of acting at peril. Therefore, to entitle plaintiff to recover, it is not necessary for him to allege or prove either malice or want of probable cause. Malice is material only so far as the question of damages is concerned. It is immaterial whether the detention be accomplished with or without legal process. Hale on Torts, 244, citing *Cunningham v. East River El. Co.*, 17 N. Y. Supp. 372; *Rosen v. Stein*, 54 Hun, 179, 7 N. Y. Supp. 368; *Hewitt v. Neuburger*, 66 Hun, 230, 20 N. Y. Supp. 913.

Of malice as an element in false imprisonment, the court, in *Stevens v. O'Neill*, 51 App. Div. 366, 64 N. Y. Supp. 663, 98 St. Rep. 663, says: "The law imputes malice to an unlawful act. There is undoubtedly a difference between malice which the law infers from the act itself, and malice which is the product of a proved mental operation. The court had the right to submit the

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Art. 3. Elements of the Wrong.

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question of malice in this case. From the very grossness of the act itself, malice may be inferred."

Where the defendant's servants caused the plaintiff to be searched on the suspicion that she had stolen a watch,—*Held*, that the jury might infer legal malice from the occurrence, and, where the act was done in pursuance of a system adopted in the defendant's store, that punitive damages might be awarded, although there was no evidence of express malice. *Stevens v. O'Neill*, 51 App. Div. 364, 98 St. Rep. 663, 64 N. Y. Supp. 663.

On this point the Court of Appeals says "that malicious motives and the absence of probable cause do not give to a party an action for false imprisonment. They may aggravate his damage, but have nothing to do with the cause of action." *Marks v. Townsend*, 97 N. Y. 597.

It was held in *Perry v. Sutley*, 45 St. Rep. 61, 18 N. Y. Supp. 633, that where probable cause is not proved, malice may be inferred.

In *Hewitt v. Newberger*, 66 Hun, 231, 48 St. Rep. 811, 20 N. Y. Supp. 913, the court said: "Evidence offered to prove malice was properly rejected. Malice is not an element of false imprisonment." Citing 7 Am. & Eng. Encyc. of Law, 664. But note that it may bear upon the question of damage, *supra*.

In false imprisonment the want of probable cause must be shown, and malice need not be proven except upon the question of damages. *Thorp v. Carvalho*, 14 Misc. Rep. 554, 36 N. Y. Supp. 1, 70 St. Rep. 760. (The statement is open to criticism.)

The motive of the defendant is a proper subject for investigation to enable the jury to pass upon the question of exemplary damages. *Fuller v. Redding*, 16 Misc. Rep. 634, 39 N. Y. Supp. 109.

The gist of the offense is unlawful imprisonment, and averments of malice and want of probable cause are merely matters in aggravation of damages. *Ackroyd v. Ackroyd*, 3 Daly, 38.

Where the facts alone establish want of probable cause malice will be inferred. *Rosekranz v. Haas*, 1 Misc. Rep. 220, 49 St. Rep. 222, 20 N. Y. Supp. 880.

The gist of the action for false imprisonment is unlawful detention, and motive will be inferred, so far at least as to sustain the action; and evidence to disprove actual motive only bears upon the question of damages. *Burns v. Erben*, 40 N. Y. 466.



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Malice is not an essential element of false imprisonment. *Limbeck v. Gerry*, 15 Misc. Rep. 663, 39 N. Y. Supp. 95.

In *Craven v. Bloomingdale*, 30 Misc. Rep. 650, 64 N. Y. Supp. 262, affirmed 54 App. Div. 266, the rule was applied that punitive damages may be recovered if the arrest was wanton or oppressive and in open disregard of the plaintiff's right to personal liberty. It may then be said that malice has been shown — not malice in its ordinary sense, but legal malice, which is sufficient to support a claim for punitive damages. Reversed 171 N. Y. 439.

### SUBDIVISION 2.

#### Probable Cause.

As to the necessity of showing want of probable cause there are statements pro and con in the decisions. On this point see cases digested under "Malice," *supra*, as well as the following:

It seems, from *Stevens v. O'Neill*, 51 App. Div. 364, 64 N. Y. Supp. 663, 98 St. Rep. 663, that it was an error for the court to charge that it was incumbent upon the plaintiff to prove that there was an absence of probable cause for her detention; but the error if any, is not available to the defendant as a ground for a new trial.

But in *Perry v. Sutley*, 45 St. Rep. 61, 18 N. Y. Supp. 633, it was held that, under the facts, the question of probable cause should have been submitted to the jury. The court said: "There must be want of probable cause and malice. But, if the former is established, the latter may be inferred therefrom." Citing *Murray v. Long*, 1 Wend. 140; *Hall v. Suydam*, 6 Barb. 83; *Wanser v. Wyckoff*, 9 Hun, 178.

The question of probable cause is not involved in an action for false imprisonment. *Myers v. Clark*, 41 N. Y. Super. (J. & S.) 107, citing 40 N. Y. 463.

Want of probable cause must be proven in an action for false imprisonment, and a discharge of the plaintiff by a police officer is *prima facie* evidence of want of probable cause and sufficient to throw the burden upon the defendant to prove the contrary. *Rosekranz v. Haas*, 1 Misc. Rep. 220, 49 St. Rep. 222, 20 N. Y. Supp. 880.

Probable cause or a reasonable ground for suspicion against the plaintiff afford no justification for an arrest and imprisonment, unless a felony has been actually committed, in which case

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the burden of proving that a felony has been committed and the facts relied upon to sustain probable cause or reasonable ground for suspicion is upon defendant. *Burns v. Erben*, 40 N. Y. 466.

Probable cause was thus defined in *Limbeck v. Gerry*, 15 Misc. Rep. 663, 39 N. Y. Supp. 95: "Probable cause is reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person arrested is guilty of the offense with which he is charged. It does not depend upon the guilt or innocence of the accused, or upon the fact that a crime has been committed. The person making the criminal accusation may act upon appearances, and, if the apparent facts are such that a discreet and prudent person would be urged to the belief that a crime had been committed by the person charged, he will be justified, although it turns out that he was deceived and that the party accused was innocent. \* \* \*

But mere suspicion, unwarranted by the conduct of the accused, or by facts known to the accuser when the accusation was made, will not exempt the latter from liability to the innocent person for damages caused by his arrest."

Failure to prosecute after arrest is insufficient to show want of probable cause in making the arrest. Where the facts are not disputed, the fact of probable cause is for the court. *O'Dell v. Hatfield*, 40 Misc. Rep. 13, 81 N. Y. Supp. 158.

Probable cause is the existence of such facts and circumstances as would incite the belief of a reasonable man, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted. *Thorp v. Carvalho*, 14 Misc. Rep. 558, 36 N. Y. Supp. 1, 70 St. Rep. 760, citing 14 Am. & Eng. Encyc. of Law, 24.

But where there is no dispute as to the facts, the question of probable cause, or the absence or want of probable cause, is for the court. *Thorp v. Carvalho*, 14 Misc. Rep. 558, 36 N. Y. Supp. 1, citing *Anderson v. How*, 116 N. Y. 336-338. Note that the latter case also involved malicious prosecution.

The question of probable cause is a question of law where the facts are not in dispute. But where the facts are controverted, and there is a conflict of evidence, or where the credibility of witnesses is to be passed upon, then it is a question for the jury under proper instruction. *Thompson v. Fisk*, 50 App. Div. 72, 63 N. Y. Supp. 352, 97 St. Rep. 352, citing *Fagnan v. Knox*, 66 N. Y. 525; *Anderson v. How*, 116 N. Y. 336.

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If an arrest or imprisonment is charged or procured upon a charge made to some public authority, no action for false imprisonment will lie against the person who made the charge upon a mere ground that the charge was false. *Pease v. Freiwald*, 39 Misc. Rep. 549, 80 N. Y. Supp. 402, citing *Cousins v. Swords*, 14 App. Div. 338, affirmed, 162 N. Y. 625, on opinion below, which holds, upon the authority of *Thaule v. Krekeler*, 81 N. Y. 428, that, to sustain an action for malicious prosecution, it is necessary that the plaintiff should allege and prove that there was no probable cause for the prosecution, and that it was instituted through malice.

## SUBDIVISION 3.

## Detention is Necessary.

It is imprisonment to stop and prevent one from going along a highway by threats. *Bloomer v. State*, 3 Sneed (Tenn.), 66. Thus it was said: "If you put your hand upon a man and tell him he must go with you, supposing you have the right and power to compel him, that is an arrest." *Wood v. Lane*, 6 Car. & P. 774; *Whitehead v. Keyes*, 3 Allen, 403; *Lansing v. Case*, 4 N. Y. Leg. Obs. 221; *Searles v. Viets*, 2 T. & C. 224.

But a partial restraint of the will of a person is not sufficient. The imprisonment is more than a mere loss of power to go wherever one pleases; it includes the notion of restraint within some limits defined by a will or power exterior to our own. A prison must have a boundary, and that boundary the party imprisoned must be prevented from passing; he must be prevented from leaving that place, within the bounds of which the party imprisoning would confine him, except by prison breach. And where the plaintiff attempted to pass in a particular direction, but was prevented by the defendant from going in any direction but one, not being that in which he had endeavored to pass, this was held to be no imprisonment. *Bird v. Jones*, 7 Q. B. 743.

So, where A. had a chamber adjoining the chamber of B., which had a door opening into it, by which there is an exit, and A. has another door which C. stops, so that A. cannot go out by that, there is no imprisonment of A. by C., because A. may go out by the door in the chamber of B., though he be a trespasser by doing it. *Wright v. Wilson*, 1 Id. Raym. 739.

Restraint is necessary, and, therefore, where a person remains in the jail liberties after having been discharged on *supersedeas*

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under the mistaken idea that a formal discharge is requisite, he has no action for false imprisonment. *Warne v. Constant*, 4 Johnc. 32.

It seems that if an order is made that a commitment issue, which order directs the sheriff to rearrest the plaintiff, but no such warrant is ever served, and no new arrest is ever made, there is no imprisonment, and it is no answer that the plaintiff thought he was coerced, and believed he was in the custody and under the necessity of obeying an order of the court, and so was under a sort of compulsion, where he, through his attorney, is denying the jurisdiction of the court and insisting that its order is illegal. *Dusenbury v. Keiley*, 85 N. Y. 389.

Where plaintiff was arrested by a private person who claimed that the plaintiff had committed a misdemeanor, and who himself took the plaintiff to the police station, it was held that the question as to whether the plaintiff went with the defendant voluntarily was a question for the jury. *Crumeill v. Hill*, 2 City Ct. 236.

**SUBDIVISION 4.****Physical Compulsion not Necessary.**

Physical contact is not necessary. Thus, if a bailiff who has a process against any one says, "You are my prisoner; we have a writ against you," upon which the person addressed submits, turns back and goes with him, though the bailiff never touched him, yet it is an arrest. 2 Addison on Torts, 697 (Dudley ed.), citing *Granger v. Hill*, 4 Bing. N. C. 212; *Jones v. Jones*, 13 Ired. 448.

The manual touching of the body or actual arrest is not necessary to constitute an arrest and imprisonment. It is sufficient if the party be within the power of the person and submits to arrest. *Gold v. Bissell*, 1 Wend. 210.

It is sufficient arrest if the party, on being informed that an officer has a warrant for him, submits to such officer's control. *Van Voorhes v. Leonard*, 1 T. & C. 148.

Where an officer told the plaintiff he had a warrant for him for stealing, but allowed him to go home, and they subsequently appeared before a justice, who dismissed the complaint, it was held that there had been a sufficient arrest to maintain action for false imprisonment. *Searles v. Viets*, 2 T. & C. 224.

The fact that an officer goes in the presence of the plaintiff and inquires about stolen property, and shows him his shield, and

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tells him to come along with him to defendant's store, is an arrest. *Callahan v. Searles*, 78 Hun, 238, 60 St. Rep. 214, 28 N. Y. Supp. 904.

The actual laying on of hands, or personal violence, is not necessary to constitute an arrest. It is simply necessary that the arrested party be within the control of the officer or other person making the arrest, and submit himself to such control, in consequence of some claim of right to make the arrest, or authority to make it, by such officer or other person. Any deprivation of the liberty of another without his consent, whether by actual violence, or threats, or duress, constitutes an imprisonment. *Limbeck v. Gerry*, 15 Misc. Rep. 663, 39 N. Y. Supp. 95.

In an action for false imprisonment, arising from a search made of a woman who was accused of stealing a watch, it was held, in a case where it was claimed by the defendant that the plaintiff wished to be searched in order to clear herself of the charge, that a jury may properly find that the defendant's employees exercised restraint upon the plaintiff; that the latter did not willingly submit to the search, and that, under the circumstances, she was not required to offer physical resistance to the attempt to search her. The court said: "It seems to us, when we consider the situation of the plaintiff, that she was in the store of the defendant, surrounded by persons employed by the defendant, substantially accused of being a thief; and with a statement made to her, 'You will have to be searched;' that this was the exercise of such a dominion over her that a jury might very properly find that restraint was exercised." *Stevens v. O'Neill*, 51 App. Div. 364, 64 N. Y. Supp. 663, 98 St. Rep. 663.

It seems to be a general principle that the extent of restraint is immaterial. Thus, a defendant was held liable for the act of its servant in placing his hand upon a woman upon charge of passing counterfeit money, calling her a counterfeiter and a common prostitute, and telling her not to stir until he had procured a policeman, although he subsequently let her go, failing to find such an officer. *Palmeri v. Manhattan El. Ry. Co.*, 133 N. Y. 261.

#### SUBDIVISION 5.

##### Place of Detention is Immaterial.

As a general rule, the place of restraint is immaterial. It is not necessary that he be imprisoned within a jail, for it is imprison-

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ment if restraint be placed upon him in his own house or upon the highway, or in an open field. 1 Lib. Assis. (Year Book 22 Edw. III), p. 104.

It is none the less imprisonment, even though the plaintiff had not the power of locomotion before the imprisonment. For example, where the plaintiff, who was then sick in bed, was compelled by threats of imprisonment to give up some article, which he did, this was held to be imprisonment. See *Granger v. Hill*, 4 Bing. N. C. 212.

The place of detention is immaterial. Thus, says Blackstone, every confinement of the person is imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets. 3 Bl. Comm. 127.

But a mere physical restraint in one direction is not an imprisonment where there are means of escape. Thus, in *Bird v. Jones*, 7 Q. B. 747, where two policemen prevented plaintiff from continuing his way on the footway of a bridge, but told him he might go back if he pleased, which the plaintiff refused to do, it was held that there was no imprisonment.

It is no justification to an action for false imprisonment against the officers of a bank that a person imprisoned remained in the office after the usual time of closing, and was detained there by the locking of the door, although he knew the hour at which the bank was usually closed. *Woodward v. Washburn*, 3 Den. 369.

### SUBDIVISION 6.

#### Detention Must be against Will of Plaintiff.

To constitute false imprisonment it is necessary that the plaintiff should know of the imprisonment. Thus it was held that a scholar, who was detained by the master, could not recover for false imprisonment where it was shown that he did not know of the restraint upon his person. *Herring v. Boyle*, 1 Crompt., M. & R. 377.

"The act relied upon as an arrest must have been intended as such and so understood by the party arrested, or there is no imprisonment. \* \* \* If the plaintiff goes voluntarily with the person making the arrest, there is no arrest. \* \* \* Visiting a police station with an officer to make a statement does not constitute an arrest." Charge of the court in *Limbeck v. Gerry*, 15 Misc. Rep. 663, 39 N. Y. Supp. 95.

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Although a person is arrested upon a void warrant, he does not lose his right of action for false imprisonment by pleading not guilty before the magistrate, and consenting to adjournment without raising objection to the validity of the warrant and the regularity of the proceedings. *Blythe v. Tompkins*, 2 Abb. Pr. 468.

The principle that, in order to constitute an arrest, the plaintiff must have actually, either by force or coercion, submitted to such arrest, is illustrated in the case of *Dusenbury v. Keiley*, 85 N. Y. 383, in which case the plaintiff had been arrested under the Stillwell Act, which warrant was subsequently vacated and the plaintiff discharged from custody. In a subsequent proceeding by *certiorari*, the order was reversed and the proceeding was revived and restored, and an order was made for the rearrest of the plaintiff, and to commit him to jail, which warrant was never served, and no new arrest was made. It was held that a new trespass was not committed, and the contention that the plaintiff thought he was coerced, and that it was necessary to obey the order of the court, and so was under a sort of compulsion, was not sound, in the case of one who, through his attorney, is denying the jurisdiction of the court and insists that its orders are illegal. The court cites *Warne v. Constant*, 4 Johns. 32, where a prisoner stayed on the jail liberties after a *supersedeas*, under a mistaken idea that his liberty was not regained until a formal discharge by the sheriff, and for that cause brought an action of false imprisonment. It was held that his detention was his own act, and it mattered not that he was mistaken as to his right.

**SUBDIVISION 7.****Detention Originally Lawful May Become Unlawful.**

If a private person arrests another committing or attempting to commit a crime or misdemeanor, though the arrest may be lawful, he must take the person before a magistrate without unnecessary delay, as required by section 185, Code of Criminal Procedure. *Tobin v. Bell*, 73 App. Div. 41, 76 N. Y. Supp. 425, 110 St. Rep. 425.

Where a person is arrested by an officer without warrant in a case where he should be immediately and without delay taken before the nearest magistrate, a superintendent of police who, without process, directs his imprisonment for several days is liable for false imprisonment. *Greene v. Kennedy*, 46 Barb. 16, 48 N. Y. 653.

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Failure to take a prisoner before the court or magistrate without unnecessary delay makes an officer a trespasser *ab initio*, and liable for false imprisonment. So held where the defendant arrested plaintiff on Friday, without a warrant, and took him to the courtroom, but did not call the attention of the magistrate to the case, and thereafter detained him, without direction of the magistrate, until the following Monday, when he was discharged. *Pastor v. Regan*, 9 Misc. Rep. 547, 60 St. Rep. 204, 30 N. Y. Supp. 657, citing the case of *Tubbs v. Tukey*, 3 Cush. 438, where it was held that a person who abuses his authority becomes a trespasser *ab initio*, as where an arrest is originally lawful, but the subsequent detention is illegal and unreasonable.

Keeping one suspected in confinement for an unreasonable time, without taking him before a magistrate, may be false imprisonment. See *Hopner v. McGowan*, 116 N. Y. 405.

See *Nowak v. Waller*, 31 St. Rep. 458, 10 N. Y. Supp. 199, where it was held that a magistrate having jurisdiction was not liable for false imprisonment for failing to take an examination of the plaintiff and his witnesses and reducing it to writing. And that the party arrested cannot, for his own convenience, make a stipulation to appear at a future day and receive parole, and then complain that he was not immediately taken before a magistrate.

Where an arrest was made by a detective employed by a railroad corporation under circumstances showing good faith in the officer, and a warranted suspicion that the person was either a criminal or contemplated the commission of a crime, it was held that the company was not liable for damages caused by the action of the police sergeant or police justice in detaining the person arrested, unless the officer making the arrest requests that it be done. *Newman v. N. Y., L. E. & W. R. R. Co.*, 54 Hun, 335, 27 St. Rep. 135, 7 N. Y. Supp. 560.

In *Reynolds v. Corp.*, 3 Cai. 267, it was said that where a defendant has been liberated from confinement for want of being charged on execution, trespass will not lie against the plaintiff and his attorney, for imprisoning him a second time, on an execution issued upon the old judgment in the suit from which he was discharged, the process being only voidable.

As to the modern rule, see *Dusenbury v. Keiley*, 85 N. Y. 383.

Where a person has been lawfully arrested on a criminal warrant, and is subsequently discharged from arrest on entering a



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recognizance, the warrant has spent itself, and an officer cannot arrest him again without new process. *Doyle v. Russell*, 30 Barb. 300.

An insolvent's discharge under the Two-thirds Act extinguishes an existing judgment against a debtor for tort, and, therefore, if he is subsequently arrested upon such judgment the party making the arrest, as well as the attorney, are liable for false imprisonment, whether they were notified of the discharge or not, though want of notice of discharge goes in mitigation of damages. *Deyo v. Van Valkenburg*, 5 Hill, 242.

A sheriff who received from the attorney for a judgment creditor an order of discharge from arrest of the judgment debtor, and failed to make objection to the order and did not return it but failed, nevertheless, to act upon it, and rearrested the judgment debtor, who sued out an appeal, was held liable for false imprisonment. *Davis v. Bowe*, 118 N. Y. 55, 27 St. Rep. 862, affirming 3 St. Rep. 531.

In *Holley v. Mix*, 3 Wend. 351, it was held that false imprisonment will lie against an officer and a complainant in a criminal prosecution where they combined to extort money from a party accused, by operating upon his fears, although such party be in the custody of an officer on a valid warrant issued on a charge of felony. In a note to this case it is stated that one who abuses an authority in fact thereby becomes a trespasser *ab initio*, but otherwise if he abuses an authority in law. *Van Brunt v. Schenck*, 13 Johns. 414; *Allen v. Crofoot*, 5 Wend. 506; *Dumont v. Smith*, 4 Den. 319; *Carnick v. Myers*, 14 Barb. 9.

For the statutory penalty to which a sheriff or jailer is liable for refusing to discharge a prisoner in certain cases, who has been arrested on an execution issued by a justice of the peace, see Code Civ. Proc., § 3035.

**SUBDIVISION 8.****Termination of Detention — When Necessary.**

The rule in regard to the necessity for the termination of the criminal proceedings upon which an action is founded is thus stated in *Cuniff v. Beecher*, 84 Hun, 140, 32 N. Y. Supp. 1067: "It is the law of the State that a party cannot maintain a civil action for damages for malicious prosecution or false imprisonment where his arrest has been followed by conviction in a criminal court and that conviction remains unreversed, unless he

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shows the fact that his conviction was obtained by fraud or conspiracy, and that fraud or conspiracy must be one in which the court and the person whom he proceeded against participated. \* \* \* The person who is, or who believes himself to have been, unjustly arrested and convicted, must procure a reversal of such judgment before he can maintain a civil action for damages." Citing *Robbins v. Robbins*, 133 N. Y. 597; *Oppenheimer v. Manhattan Ry. Co.*, 18 N. Y. Supp. 411.

The principle that there must be a termination of the prosecution in order to sustain an action for false imprisonment is illustrated in *Atwood v. Beirne*, 73 Hun, 547, 26 N. Y. Supp. 149, 59 St. Rep. 264. In that case two cross-complaints for assault and battery were made and one complaint for larceny. One of the assault cases was tried three times before a verdict was reached, and the parties, their counsel, and the justice, being tired of the proceeding, agreed that the parties should be absent from court on the day to which the proceedings were adjourned and each complaint thus fell for want of prosecution. It was held that it was not such a termination of proceedings as would sustain an action for false imprisonment. The disposition of the matter was judicious and creditable to all concerned, but it was not such a termination of the prosecution as would sustain an action. In principle it was a compromise or an abandonment of the proceedings by mutual consent, and no real determination has been had. On that ground the plaintiff's case fails.

It was held, however, by the Court of Appeals, in *Fay v. O'Neill*, 36 N. Y. 11; that for the purposes of an action of false imprisonment the abandonment of the charge and discontinuance of the prosecution is equivalent to a discharge from the accusation. The court said: "It was sufficiently shown that the prosecution was at an end. The complaint was dismissed by the magistrate in consequence of the complainant not appearing to prosecute at the time to which the case was adjourned. This was a sufficient termination of the prosecution." Citing *Clark v. Cleveland*, 6 Hill, 344; *Secor v. Babcock*, 2 Johns. 203; *Purcell v. MacNamara*, 9 East, 361; *Burhans v. Sanford*, 19 Wend. 417; *Watkins v. Lee*, 5 Mees. & Wels. 270.

Where a party is relieved from body execution issued on a judgment previously paid or discharged, the court cannot stipulate that he shall not bring an action for false imprisonment on

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granting relief from arrest. But if the party is to be relieved from arrest because of mere irregularity the court may require such a stipulation as a condition. *Deyo v. Van Valkenburg*, 5 Hill, 242.

Where the plaintiff has been illegally arrested by virtue of a body execution issued on a judgment for costs, which order was set aside, the plaintiff thereupon bringing an action for false imprisonment, it was held, on a motion by defendant to have the order setting aside the arrest modified so as to impose upon the plaintiff the condition that he should not bring an action for false imprisonment, that such a condition could not be imposed. *Catlin v. Adirondack Ry. Co.*, 22 Hun, 493.

Where a process is void absolutely, no preliminary proceedings to vacate or set aside are necessary as a condition to the maintenance of the action for false imprisonment. But where the court has jurisdiction and the process is merely irregular by reason of the nonperformance of a preliminary requirement, or the existence of a fact not disclosed in the application therefor, such process must be regularly vacated and annulled before the action of false imprisonment can be maintained. *Fischer v. Langbein*, 103 N. Y. 89.

It seems that where a warrant of arrest has been issued upon insufficient affidavit, an action against the party instigating the imprisonment may be sustained even without traversing the proceedings upon *certiorari*. *Freedenburg v. Hendricks*, 17 Barb. 183, citing *Prosser v. Secor*, 5 Barb. 607.

It was held in the Court of Appeals, in an action which joined malicious prosecution and false imprisonment in one complaint, that in the action for malicious prosecution a final judgment on trial so far terminates the proceeding that the defendant may sue for malicious prosecution. The fact that an appeal from the judgment is pending when the action is commenced simply places the risk upon him of an adverse decision upon appeal which will defeat his action. *Marks v. Townsend*, 97 N. Y. 597.

In *Deyo v. Van Valkenburg*, 5 Hill, 242, it was held that one arrested on a judgment in tort, which had been paid or otherwise discharged, need not obtain a rule setting aside the process in order to maintain an action for false imprisonment. *Contra*, where the action is founded upon a mere irregularity in issuing the process.

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It is held that where a party has been arrested on a warrant and brought before a justice of the peace charged with the crime of larceny, and the hearing is adjourned, that the action of a special county judge in discharging the prisoner on *habeas corpus* instituted before him on the adjourned day, and before any further proceedings before the justice, the writ of *habeas corpus* not running to the constable, and he not being present on the proceedings, that it did not operate to end the criminal proceedings, although the justice of the peace took no further action in the matter. *Vorce v. Oppenheim*, 37 App. Div. 69, 55 N. Y. Supp. 596.

An arrest, not alleged to have been malicious, made under execution of justice's judgment for a penalty, does not create a liability for false imprisonment, because the act giving the penalty was not applicable, if the judgment remains unreversed. *Haley v. Connell*, 17 Week. Dig. 21.

The abandonment of a criminal charge and discontinuance of the prosecution before a magistrate is equivalent to a discharge from the action, and operates as a termination of the proceeding. *Warren v. Dennett*, 17 Misc. Rep. 88, 39 N. Y. Supp. 830, citing *Fay v. O'Neill*, 36 N. Y. 13.

See *Hopner v. McGowan*, 116 N. Y. 405, for a case where the court held that in the particular action for false imprisonment the termination of the criminal proceedings against the plaintiff had no importance although such a fact is essential in an action for malicious prosecution.

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**SUBDIVISION 1.****Arrest by Private Person.**

The cases in which a private person may arrest another are thus stated in section 183, Code of Criminal Procedure: (1) For a crime committed or attempted in his presence; (2) When the

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person arrested has committed a felony, although not in his presence.

Note that section 184, Code of Criminal Procedure, requires such private person to inform the party arrested of the cause thereof, except when he is in the actual commission of the crime, or when he is arrested on pursuit immediately after its commission. Section 185 requires that the person making such an arrest shall take the party accused before a magistrate or deliver him to a police officer without unnecessary delay.

In regard to an arrest by a private person without warrant where an affray has been committed, the rule is thus stated in *Phillips v. Trull*, 11 Johns. 486: All persons whatever, who are present when a felony is committed, or a dangerous wound is given, are bound to apprehend the offenders. So any person whatever, if an affray be made, to the breach of the peace, may, without a warrant from a magistrate, restrain any of the offenders in order to preserve the peace, but after there is an end of the affray, they cannot be arrested without a warrant." Adopting the statement in 3 Hawk. P. C. 174, b. 2, s. 20, as follows: "It seems clear, that regularly, no private person can, of his own authority, arrest another for a bare breach of the peace after it is over."

The arrest of a felon may be justified by any person without a warrant whether there was time to obtain a warrant or not, if a felony has in fact been committed by the person arrested. Thus, if an innocent person is arrested upon suspicion by a private individual, the person making the arrest is excused if a felony was, in fact, committed, and there was reasonable ground to suspect the person arrested had committed it. But if no felony has been committed and a private individual arrests without a warrant, such arrest is illegal. An officer, however, would, in such a case, be justified if he acted upon information from another, which he had reason to rely upon. *Holley v. Mix*, 3 Wend. 351.

Ordinarily no person can be arrested without a warrant. But if a felony or breach of the peace is committed by the person arrested, the person making the arrest may justify it without a warrant, whether there was time to procure a warrant or not; yet if an innocent person be arrested upon suspicion by a private individual, such individual is not excused unless such offense has, in fact, been committed, and there was reasonable ground to sus-

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pect the person arrested. *Limbeck v. Gerry*, 15 Misc. Rep. 663, 39 N. Y. Supp. 95.

A private person detecting another in the act of committing, or attempting to commit, a crime or even a misdemeanor may lawfully arrest him. But to justify the arrest he must immediately take the person before a magistrate without unnecessary delay as required by section 185 of the Code of Criminal Procedure. *Tobin v. Bell*, 73 App. Div. 41, 76 N. Y. Supp. 425, 110 St. Rep. 425, citing Code Crim. Proc., § 183; *Greater N. Y. Athletic Club v. Wurster*, 19 Misc. Rep. 443 (450), 43 N. Y. Supp. 703.

Where the defendant personally arrested and detained plaintiff in a police box until a police wagon came to take her to the station-house, charging her with kicking over his barrel, it was held that he was liable for false imprisonment. On the trial it appeared that some boys had knocked over the barrel. The court said: "No crime was proven against the plaintiff and none was committed by her. The defendant had no right to arrest her without a warrant. § 183 of Code Crim. Proc." *Ball v. Harrigan*, 47 St. Rep. 384, 19 N. Y. Supp. 919.

In regard to an arrest by a private individual the rule as to liability was thus stated in *Burns v. Erben*, 40 N. Y. 463: "As a general principle no person can be arrested or taken into custody without a warrant. But if a felony or breach of the peace has in fact been committed by the person arrested, the arrest may be justified by any person without warrant, whether there was time to procure a warrant or not; but if an innocent person be arrested upon suspicion by a private individual, such individual is not excused unless such offense has, in fact, been committed, and there was reasonable ground to suspect the person arrested."

*Carl v. Ayres*, 53 N. Y. 17, thus states the rule governing the arrest by a private person without warrant: "A person making a criminal accusation may act upon appearances, and if the apparent facts are such that a discreet and prudent person would be led to the belief that a crime had been committed by the person charged, he will be justified, although it turns out that he was deceived and that the party accused was innocent. Public policy requires that a person shall be protected, who in good faith and upon reasonable grounds causes an arrest upon a criminal charge, and the law will not subject him to liability therefor. But a groundless suspicion, unwarranted by the conduct of the accused, or by

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facts known to the accuser, when the accusation is made, will not exempt the latter from liability to an innocent person for damages for causing his arrest. A man has no right to put the criminal law in motion against another and deprive him of his liberty upon mere conjecture that he has been guilty of a crime."

Andrews, Ch. J., in *Farnam v. Feeley*, 56 N. Y. 451, says: "To justify a private person in arresting or aiding in the arrest of another without a warrant on a criminal charge, it must appear that a felony had been committed, and that he acted circumspectly and upon grounds which would have justified a careful and prudent person in believing the person arrested was guilty of the crime. The burden is upon him to show, when sued for the arrest, that the circumstances justified the suspicion, and if this is made to appear he is not liable, although the accused was, in fact, innocent." See Addison on Torts, 555; *Holley v. Mix*, 3 Wend. 354; *Brackett v. Eastman*, 17 Wend. 32; *Carl v. Eyres*, 53 N. Y. 14; *Holroyd v. Doncaster*, 11 Moore, 440.

In *Frost v. Pinkerton*, 61 App. Div. 566, 70 N. Y. Supp. 892, 104 St. Rep. 892, where the plaintiff was arrested and assaulted for clandestinely transmitting information in regard to races from the Jockey Club grounds, which was a violation of the regulations of the racecourse, the court said: "Pinkerton and his force were private citizens; the plaintiff was not engaged in the commission of a misdemeanor, but at most only a violation of a rule or regulation of the racecourse. There was no right, therefore, to arrest the plaintiff." \* \* \*

Bail may arrest their principal at any time or place, or may delegate the power to another to do so. *Harp v. Osgood*, 2 Hill, 216; *Nicolls v. Ingersoll*, 7 Johns. 146-153. The liability of private persons as complainants where the arrest is made by an officer, with or without process, will be found. "*Arrest by officer on complaint of private person*," *subd. 3, post*.

### SUBDIVISION 2.

#### Arrest by Police Officer.

Although an arrest by a private person is excused only where a felony has been committed, and there is reasonable ground to suspect the person arrested of its commission, yet a constable is justified in making an arrest without a warrant although no felony has in fact been committed if he has reasonable ground to sus-

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pect that one has been committed, and acts in good faith and without evil design. *Burns v. Erven*, 40 N. Y. 463.

The same principle was applied in *Newman v. N. Y., L. E. & W. R. R. Co.*, 54 Hun, 335, 27 St. Rep. 135, 7 N. Y. Supp. 560, where it was held that if the appearance of the person arrested and the circumstances were such as to justify a careful conclusion on the part of the officer that the plaintiff had either committed a felony or was about to commit a felony, he was excused for making the arrest, although it might turn out thereafter that the suspicion was unfounded.

Where a person is arrested without a warrant he must "immediately and without delay" be taken before the nearest magistrate, and a superintendent of police must govern his officers accordingly and he is liable for false imprisonment if he directs the imprisonment of such a person arbitrarily and without process of law for several days. *Greene v. Kennedy*, 46 Barb. 16, affirmed without opinion, 48 N. Y. 653.

Where the offense on which the plaintiff was arrested is a misdemeanor, not committed in the officer's presence, an arrest without warrant is illegal, and renders the officer making it liable for false imprisonment. *Kolzen v. Broadway, etc., Ry. Co.*, 1 Misc. Rep. 148, 48 St. Rep. 656, 20 N. Y. Supp. 700.

An officer of a society for prevention of cruelty to animals acting under Laws of 1867, chap. 375, has authority to arrest offenders violating that act, without first obtaining a warrant. It seems that where a warrant is first obtained the person executing it will be protected whether the person arrested is innocent or guilty, and if the statute alone is relied upon by the person making the arrest he is only protected by showing that the person arrested was violating the law. *Davis v. American Society, etc.*, 75 N. Y. 362, affirming 6 Daly, 81.

A police officer arresting without a warrant or reasonable cause on ground of felony cannot justify such arrest where the person is innocent of the felony by reason of the fact that he was subsequently arraigned and convicted of a misdemeanor of which the officer had no knowledge at the time of the arrest.

An officer who arrests a person without a warrant upon a suspicion of felony, to wit, having stolen goods, cannot subsequently justify the arrest upon the ground that the plaintiff committed a misdemeanor in that he carried concealed weapons. *Snead v. Bon-*



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*noil*, 49 App. Div. 330, 97 St. Rep. 553, 63 N. Y. Supp. 553, affirmed, 166 N. Y. 325.

The court said: "There can be no general right to arrest a citizen for an undisclosed offense. The statute requires the officer to inform the arrested person of his authority and the cause of the arrest, except when the person arrested is in the actual commission of a crime. \* \* \* Where there is no overt act of criminality, or visible offense committed in the immediate presence of the officer, he must inform the arrested person of the cause of the arrest. He cannot arrest a man for one cause and, when that is exploded, justify for another.

An arrest can be made under section 177 of the Code of Criminal Procedure by a peace officer without a warrant only when a crime has been committed or attempted in his presence or where the person arrested has committed a felony although not in his presence, or where the felony has, in fact, been committed and the officer making the arrest reasonably believes him to have committed it. *People v. Hochstein*, 76 App. Div. 25 (28).

Where a police officer, without a warrant, and at the instigation of the defendant, arrests the plaintiff, in a case where a felony had in fact been committed, and where the question as to reasonable cause is in controversy, the liability of the defendant depends upon whether the arrest by the police officer was founded upon reasonable cause, and that, under the circumstances, this was a question of fact for the jury; that it was error for the court to decide as a matter of law that such officer did not have reasonable grounds for the arrest. *Thompson v. Fisk*, 50 App. Div. 72, 63 N. Y. Supp. 352, 97 St. Rep. 352, citing Code Crim. Proc., § 177.

If an officer makes an arrest without warrant in a case where no such power is given him by law, he is liable to an action for false imprisonment, even though the party were guilty of the offense charged. *Myers v. Clark*, 9 J. & S. 107.

Where a judgment upon which a party has been arrested is paid and discharged, and the sheriff receives without objection an order from the creditor's attorney ordering a discharge of the debtor, who at that time is out on bail, the sheriff is liable for false imprisonment if he subsequently rearrests the debtor. Such an order of discharge from the creditor's attorney raises the presumption that it is duly authorized, and, while this presumption may not be conclusive upon the sheriff, it requires some action, upon his

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part, either to return it or give notice that he requires something further. If he does not raise such objection, he must act upon it as sufficient. *Davis v. Bowe*, 118 N. Y. 55, affirming 22 J. & S. 520, 3 Rep. 531.

A policeman, going upon private property without a warrant or process, has no authority to determine the right to possession of personal property between adverse claimants, and if he uses force and takes possession of such property he is liable. So held in an action for false imprisonment, where a police officer went to the apartments of the plaintiff to procure a trunk belonging to a former boarder, and, upon the plaintiff refusing to give up the trunk, forcibly removed it, and, upon her resisting, arrested her for interfering with an officer in the discharge of his duty. *Isaacs v. Flahive*, 14 Misc. Rep. 249, 35 N. Y. Supp. 716.

Where an action is brought against a policeman, it is no defense that his superior officer ordered him to make the arrest. *Myers v. Clark*, 41 N. Y. Super. (J. & S.) 107.

In regard to arrest without a warrant, see the case of *Balbo v. People*, 80 N. Y. 484, 499; also, *People ex rel. Kingsley v. Pratt*, 22 Hun, 300; *Niger v. Clark*, 41 N. Y. Super. 107; *Hennessey v. Connolly*, 13 Hun, 173; *Sternach v. Brocks*, 7 Daly, 142; *McIntyre v. Radens*, 46 N. Y. Super. (J. & S.) 123.

### SUBDIVISION 3.

#### Arrest by Officer on Complaint of Private Person.

The rule as to the liability of a private person, where another is arrested by an officer, is stated thus in *Brown v. Chadsey*, 39 Barb. 253, at 262: " \* \* \* if the defendant directed the officer to take the plaintiff into custody, he was liable to an action for false imprisonment, but if he merely made his statement, leaving it to the officer to act or not, as he thought proper, he was not liable to an action of trespass for the arrest."

It seems to be a general principle that one who causes the arrest of a person is not liable for such damages as are caused by the action of a police sergeant or police justice in detaining a person arrested, unless he is detained at the request of the one making or procuring the arrest. Upon this principle, see *Newman v. N. Y., L. E. & W. R. R. Co.*, 54 Hun, 335, 7 N. Y. Supp. 560, citing *Lott v. Ashton*, 18 L. J. Q. B. 76, where the court held that

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the defendant was not liable for damages caused by the detention of the plaintiff by the magistrate himself.

Where the general manager of a restaurant caused the plaintiff's arrest for passing cashier's desk without paying a check, it was held that the defendants were liable, even though the defendant had a rule posted that every one must stop at the cashier's desk whether he had a check or not. This rule was not posted or displayed so that customers could become aware of it. *Dupre v. Childs*, 52 App. Div. 306, 99<sup>th</sup> St. Rep. 179, 65 N. Y. Supp. 179, affirmed, on opinion below, 169 N. Y. 585.

Where the defendants had left their house in charge of the plaintiff, a servant, with directions not to allow strangers to enter, and where, on returning, they discovered jewelry to be missing, and had a detective investigate, and where the plaintiff said she admitted a stranger to the house to repair the electric lights, and thereupon the detective arrested her without warrant upon the investigation of the defendant,—*Held*, that, as a felony was committed, plaintiff's arrest was legal under section 157 of the Code of Criminal Procedure, and the detective had reasonable ground to believe defendant had committed the felony; that it was error for the court to decide, as a matter of law, that he did not have reasonable ground for that belief. *Thompson v. Fisk*, 50 App. Div. 71, 79 St. Rep. 352, 63 N. Y. Supp. 352.

If the defendant merely complains to the police authorities of a robbery, and states various circumstances of suspicion to a police officer, and the latter makes inquiries concerning these circumstances, the defendant is not liable. *Limbeck v. Gerry*, 15 Misc. Rep. 668, 39 N. Y. Supp. 95.

A private person who directs a police officer to make an arrest, under circumstances not justifying the same, is responsible for the arrest. *Dodge v. Alger*, 53 N. Y. Super. 107. Thus, where the defendant sent for a police officer, and upon his arrival directed the arrest of the plaintiff for breach of the peace committed before the officer's arrival, and the officer made the arrest without warrant, it was held that the defendant directing the arrest was liable for false imprisonment, that the arrest was illegal, and that he and the officer were joint tortfeasors. *Wynn v. Hobson*, 54 N. Y. Super. 330.

A private person is liable, even though he does not distinctly order an officer to arrest plaintiff, if he subsequently ratifies such

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act. *Callahan v. Searles*, 78 Hun, 238, 60 St. Rep. 214, 28 N. Y. Supp. 904.

An officer will be justified in arresting a person without a warrant if he acts upon information from another, which he has reason to rely upon. In trying the legality of the acts done by provost-marshals, and their deputies, in the exercise of their duty, great latitude should be allowed, a public duty being imposed upon them, for public purposes, and they being punishable for a neglect of duty, if they fail to act, in a case where there is sufficient or probable cause for acting. *Hawley v. Butler*, 54 Barb. 490.

Where defendant had the plaintiff arrested without a warrant for obtaining property under false pretenses, it was held that he was liable for false imprisonment; that the obtaining of property under false pretenses where the owner, although induced by said false pretense, parts with the possession of them, intending to surrender title, the act of the plaintiff was not larceny, and did not justify the arrest. *Thorne v. Turck*, 94 N. Y. 90, affirming 10 Daly, 329, and distinguishing *Loomis v. People*, 67 N. Y. 322.

Where the manager of a restaurant caused the arrest of the plaintiff for having refused to pay the entire amount of his bill, preferring a charge of disorderly conduct against him, and where the plaintiff paid the additional sum and was discharged, it was held that there was no liability for false imprisonment; that the arrest was lawful, and that the court erred in refusing to dismiss on the ground that there was no evidence of the unlawfulness of the arrest. *Warren v. Dennett*, 13 Misc. Rep. 329, 68 St. Rep. 366, 34 N. Y. Supp. 462.

### ARTICLE V.

#### LIABILITY FOR ARREST ON VOID OR INVALID PROCESS.

In regard to the liability of plaintiffs for an arrest of defendant, the general principle seems to be that, where the right to arrest has been a point judicially decided in an action, the plaintiff is protected by such judgment, though, if resort be had to management or artifice to deprive the defendant of the benefit of the exemption against his body, it seems that an action for false imprisonment will lie. *Brown v. Crowl*, 5 Wend. 298.

Defendants are liable for arrest, under voidable process, the same as if the arrest was under void process, when such voidable

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process has been set aside as irregular. When such process is set aside, it ceases to be a justification to the parties guilty of the irregularity, and as to them it is void, and as if it had never existed. The arrest, therefore, by relation, becomes void and without authority, and the action of trespass is proper remedy. *Chapman v. Dyett*, 11 Wend. 31.

Where one makes a complaint before a police magistrate on a subject-matter over which the magistrate has a general jurisdiction, and the magistrate thereupon issues a warrant, upon which the party complained of is arrested, the complainant is not liable, in an action for false imprisonment, although the facts stated in the complaint do not constitute a criminal offense, so as to give the magistrate authority to act in the particular case. So held where a party applying to a magistrate for a warrant of arrest, under an act to punish nuisances and malicious trespasses upon land, did no more than state his case to the magistrate, without bad faith or malice. *Held*, that he was not liable for an action of false imprisonment, even though it be erroneous. *Von Latham v. Libby*, 38 Barb. 339.

The mere fact that a party goes before a magistrate and states what he regards as constituting a criminal offense is not sufficient to make him liable for false imprisonment, in the absence of malice or proof that he made a false statement or asked for a warrant or took part in its service, and both the complainant and the constable are protected if the justice held that the evidence was sufficient for the issuance of a warrant. Nor is the magistrate on his part liable for false imprisonment for a mere mistake of judgment, such as failing to take an examination of the plaintiff and his witnesses and reducing the same to writing. *Nowak v. Waller*, 31 St. Rep. 458, 10 N. Y. Supp. 199.

If the complaint or deposition upon which the plaintiff was arrested was sufficient to give the justice jurisdiction, and show that a crime has been committed, and was sufficient to call for a judicial determination of the justice as to whether there is reasonable ground to believe that the accused committed the crime charged, then the prosecutor will be protected in an action for false imprisonment, although the magistrate may have erred in his judgment. In determining the sufficiency of such judgment, the court will be allowed great latitude of construction, where it is brought in collaterally, as in an action for false imprisonment. *Swart v. Rickard*, 148 N. Y. 264, reversing 74 Hun, 339.

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If a justice of the peace, through error, determines that an offense has been committed, and that there is probable cause against the accused, and issues a warrant, the complainant is not liable for false imprisonment. Nor will mere delivery of the warrant, believed to be valid, by the complaint to the officer, subject him to an action for false imprisonment. Otherwise, where the warrant is delivered with directions to arrest in a case where the warrant is void. *Lewis v. Rose*, 6 Lans. 206.

A justice of the peace, in an action regularly brought before him to recover a penalty for less than \$200, has jurisdiction to pass upon every question involved in the action, including the validity of the law imposing the penalty; and his judgment, so long as it remains unreversed, is conclusive upon the parties upon every question necessarily embraced therein. Hence, process regularly issued upon such a judgment, authorizing the imprisonment of the defendant therein, is a protection in an action for false imprisonment to the officer executing it, and to the parties at whose instance it was issued and served. *Hallock v. Dominy*, 69 N. Y. 238, reversing 7 Hun, 52, citing *Chapman v. Dyett*, 11 Wend. 31; *Brown v. Crowl*, 5 Wend. 298; *Ackerly v. Parkinson*, 3 M. & S. 411; *Doswel v. Impey*, 1 B. & C. 163, 1 Chit. Pl. 181; *Miller v. Adams*, 52 N. Y. 409; *Beaty v. Perkins*, 6 Wend. 382.

A complainant upon whose charge the plaintiff is arrested is protected under a warrant which charges a criminal offense generally — that is to say, the offense of larceny — although the warrant fails to state the value of the property, and so is indefinite as to whether the crime is petit or grand larceny. *Payn v. Barnes*, 5 Barb. 465.

It was held that, where a complaint was not on oath, and did not charge that the acts complained of were committed with criminal intent, no jurisdiction in the justice was shown, and the action of false imprisonment could be maintained against the complainant. *Wilson v. Robinson*, 6 How. Pr. 110.

But it is held that, where the complaint gave the justice jurisdiction by charging a criminal offense, although it does not specify the facts which constitute the offense, and although the justice erred in issuing a warrant, no action for false imprisonment can be maintained against the complainant or against the justice. *Campbell v. Ewalt*, 7 How. Pr. 399.

In a case where the defendant had made a charge of perjury

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against the plaintiff, and asked for the issuance of a warrant, and where the plaintiff was subsequently discharged upon the ground that no perjury had been committed, the court said, in discussing defendant's liability for false imprisonment: "We think, therefore, that the statements in the deposition were sufficient to require a justice to determine whether or not the crime of perjury had been committed by the defendant. In that case, although his conclusions may have been erroneous he acted within his jurisdiction, and his issuing of the warrant is a protection to any person who acted under it. \* \* \* The justice had jurisdiction to issue it (the warrant), and for that reason the defendant was not liable for false imprisonment, even if he had taken such part in the arrest as would have constituted him a trespasser had the warrant been void." *Krauskopf v. Tallman*, 38 App. Div. 273, 56 N. Y. Supp. 967, citing *Hallock v. Dominy*, 69 N. Y. 238.

A detective employed to investigate an alleged crime, and who subsequently verifies an information prepared by the district attorney, embodying the results of the investigation, ending with the words: "Wherefore, deponent prays that a warrant may be issued," etc., is not liable for false imprisonment, though the party arrested on the warrant issued upon such information was subsequently discharged. Such defense comes within the rule laid down in *Von Latham v. Libbey*, 38 Barb. 339, which the court says "has never been questioned in this State." *Whitney v. Hanse*, 36 App. Div. 420, 55 N. Y. Supp. 375.

In *Taylor v. Trask*, 7 Cow. 249, it was held that a party was not liable for false imprisonment in a case where the plaintiff was arrested by the mistake of a justice of the peace in issuing process against his body, where the arrest was made without plaintiff's knowledge and where as soon as he knew of the mistake plaintiff obtained discharge of the party arrested. A party in a justice's court is not accountable for the issuance of a process unless he directs and sanctions it, but it is otherwise as to process issued by an attorney in the court of record.

It is held, however, in *Gold v. Bissell*, 1 Wend. 210, that in a justice's court, where a summons is the regular process, a warrant without oath is void, and all parties concerned in the arrest under such process are trespassers; though in same case it was held that a party in a justice's court is not held responsible for the issuance of a process unless he directs and sanctions it.

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In *Brown v. Crowl*, 5 Wend. 298, it was held that the plaintiff in a justice's court is not liable for false imprisonment for insisting that he has a right to a body execution where it is decided in favor of the plaintiff's contention judicially. The plaintiff is protected by the judgment, even though the same is erroneous. See also case of *Peckham v. Tomlinson*, 6 Barb. 253, where it was held that a person who prefers a criminal charge against another before a justice of the peace, and is a witness upon the trial and employs counsel to conduct the trial for the people, is not liable for false imprisonment after an erroneous conviction by a justice where there is nothing to connect him with the unlawful imprisonment of plaintiff.

Making a complaint against a person as a lunatic before a magistrate, who thereupon issues an order for the arrest of the alleged lunatic as such, is not a sufficient ground in itself to support an action for false imprisonment. *Williams v. Williams*, 2 Hun, 111, 4 T. & C. 251.

The mere fact that a party goes before a magistrate and makes a statement that he regards as a criminal charge is not sufficient to make him liable for false imprisonment in the absence of proof of malice, or that he made a false statement and asked for the warrant or took part in its service. *Nowalk v. Waller*, 31 St. Rep. 458, 10 N. Y. Supp. 199.

For a case where it was held that the defendant was justified in arresting the plaintiff, where the plaintiff had hired defendant's horse and had failed to return it at the time promised, see *Olmstead v. Dolan*, 25 St. Rep. 634, 6 N. Y. Supp. 130.

A ministerial officer is protected in the execution of process whether the same issued from a court of general or limited jurisdiction, even though the court in fact had no jurisdiction, provided it appears on the face of the process that the court had jurisdiction of the subject-matter, and nothing appears to apprise the officer but that the court also had jurisdiction of the person. *Savacool v. Boughton*, 5 Wend. 171.

This is a leading case and has been cited and followed in a large number of subsequent cases.

If the process is regular on its face it cannot be shown that the officer knew facts avoiding it. *Weber v. Gay*, 24 Wend. 485; *People v. Warren*, 5 Hill, 440.

If there is enough evidence to warrant a magistrate in taking



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action, his action is judicial, and he and the officer executing the order are protected. *Minehan v. Thomas*, 9 Week. Dig. 32.

In an action for false imprisonment under a judgment which had been set aside, the writ is a sufficient protection if it shows that the order setting it aside was not legally made. *Lewis v. Penfield*, 39 How. Pr. 490.

The taking of an indemnity does not deprive an officer of the protection which his process affords. *Horton v. Hendershot*, 1 Hill, 118.

If the sworn complaint charging a person with a crime is sufficient to give a magistrate jurisdiction to issue a warrant, the person making the complaint is protected by it, and the arrest of the plaintiff under it is fully justified. *Gardner v. Bain*, 5 Lans. 256; *Lewis v. Rose*, 6 Lans. 206.

A warrant is not invalid because of an error in its date. *Nowak v. Waller*, 31 St. Rep. 458, 10 N. Y. Supp. 199.

For a case where a constable, executing a warrant for violation of statute as to the observation of Sunday, was held not liable, see *Stewart v. Hawley*, 21 Wend. 552.

Where the execution against a person has been declared to be regular by a court having jurisdiction, such decision is binding on appeal by the plaintiff in an action to recover damage for alleged false imprisonment. *Sherman v. Grinnell*, 159 N. Y. 50, citing *Culross v. Gibbons*, 130 N. Y. 447.

In *Sherman v. Grinnell*, *supra*, the right to a body execution in an action for conversion of money is discussed.

An officer executing a warrant will be protected in so doing where the warrant shows a case within the jurisdiction of the justice issuing it, although it does not recite a legal offense. *Smith v. Warden*, 4 Hun, 787. The court says: "Ever since the case of *Savacool v. Boughton*, 5 Wend. 170, it has been recognized principle of the law of this State that the process of a magistrate having jurisdiction of the subject-matter, fair on its face, protected a ministerial officer in its execution." *Atchison v. Spencer*, 9 Wend. 62; *Campbell v. Ewalt*, 7 How. 400.

Where a party obtains a body execution after judgment in an action for conversion, such execution, under section 3026 of the Code of Civil Procedure, is available as a defense in a subsequent action for false imprisonment. *Farrelly v. Hubbard*, 148 N. Y. 592, reversing 84 Hun, 391.

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The defendant was held liable for false imprisonment in making an arrest in violation of Laws of 1831, p. 396, being an act to abolish imprisonment for debt, in spite of the issuance of a judge's order to hold to bail. The court said: "Now since the Act of 1831 no authority to arrest exists here except in the cases specified in the second section, and the plaintiff and his attorney, therefore, must see to it that the defendant is liable to arrest before direction for his arrest, or that he be held to bail, may be given." *Bracket v. Eastman*, 17 Wend. 32.

If an attachment, although issued by a tribunal with jurisdiction, is set aside for irregularity, the party taking it out becomes a trespasser *ab initio*, and he cannot escape liability by throwing the responsibility upon his attorney. *Ackroyd v. Ackroyd*, 3 Daly, 38.

A judgment creditor is not liable in an action for false imprisonment for the arrest of his debtor under an erroneous order in supplementary proceedings where the judge had jurisdiction to make the order. *Waldo v. Selden*, 4 Week. Dig. 370.

Where one procured a warrant of arrest under a nonimprisonment act, which was issued upon an insufficient affidavit and was void for want of jurisdiction, it was held that an action for false imprisonment would lie against the person procuring such warrant after the proceedings had been annulled upon *certiorari*. *Vredenburg v. Hendricks*, 17 Barb. 179.

A discharge under the Two-thirds Act acts upon a previously existing judgment for tort, discharges the same as if it had been paid or released. Therefore, when a debtor is arrested on such judgment after such discharge the party at whose instance it is issued, as well as the attorney who issues it, is liable for false imprisonment. And this is so whether they were notified of the discharge or not, though want of such notice is available in mitigation of damages. *Deyo v. Van Valkenburgh*, 5 Hill, 242.

A judgment protects a party for acts done under it although it is subsequently reversed for error. But it is otherwise, it seems, if such judgment is set aside for irregularity. So held where one having a judgment for conversion of personal property from which an appeal was taken without stay of proceedings.

A party who delivers to a sheriff a valid process is not responsible for irregularity of the sheriff in executing such process unless it appears affirmatively that the sheriff acted under the orders of

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the party when he committed the trespass. The party is answerable only for the validity of the process and for good faith in obtaining it. *Adams v. Freeman*, 9 Johns. 117.

By directing the issuance of an unwarranted body execution a judgment creditor becomes a joint tortfeasor with his attorney. *Baker v. Secor*, 22 St. Rep. 97, 4 N. Y. Supp. 303.

It was held that one who applies to a judge to issue an attachment and who receives and delivers it to the sheriff for service is liable for the arrest in case the attachment shall be void for want of jurisdiction or for any other cause. *Miller v. Adams*, 52 N. Y. 409, affirming 7 Lans. 101. This case hinges upon the right to an attachment in supplementary proceedings.

But it has been held that where a person has been arrested upon a criminal charge without competent evidence of guilt, both the magistrate and the prosecutor are jointly liable for false imprisonment. *Comfort v. Fulton*, 13 Abb. Pr. 276, 39 Barb. 56.

As a simple trespass is not a crime there is no authority for an arrest for such an act, and one instigating such arrest is liable. *Midford v. Kann*, 32 App. Div. 230, 52 N. Y. Supp. 995.

Where an officer without jurisdiction issues a warrant under which a person is arrested, the persons instrumental in procuring it are trespassers and liable for false imprisonment. *Lansing v. Case*, 4 N. Y. Leg. Obs. 221.

Where plaintiff was arrested on a warrant issued by the recorder of a city on information sworn to by the defendant, under section 84 of the Code of Criminal Procedure, authorizing information to be laid before a magistrate against a person threatening to commit a crime against the person or property of another, and where the information charged against the plaintiff was that he threatened to commit the crime of injuring the property of a corporation (Penal Code, §§ 639-654), it was held that while the provisions of the Penal Code do not in terms make intent a material element, yet unlawful and criminal intent must be alleged and proven. That where the warrant and the information allege no unlawful or criminal intent, and where the person furnishing the information received the warrant and delivered it to the chief of police, with the request that it be served, such person is liable for false imprisonment; that the recorder acquired no jurisdiction and that the proceedings and the warrant were absolutely void. *Hewitt v. Newburger*, 141 N. Y. 538, reversing 66 Hun, 230; s. c., 57 St. Rep. 821.

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Where the plaintiff purchased a sewing machine of the defendant, title to remain in the latter until he same is paid for, and where before full payment it was transferred to a third person with the consent of defendant's agent, and upon failure of further payments the defendants caused the arrest of plaintiff and imprisoned him for eight days, it was held, in an action for false imprisonment, that such arrest was unlawful, without probable cause, and malicious; that the defendant should have sought redress from the holder of the machine. *Davidoff v. W. & W. Mfg. Co.*, 14 Misc. Rep. 456, 35 N. Y. Supp. 1019.

For a discussion of the circumstances under which an action will lie against a person procuring a warrant to be issued, and giving directions for its service, see *Loomis v. Render*, 41 Hun, 268.

On the liability of attorneys and others in cases where the process is void or merely voidable, see *Fischer v. Langbein*, 103 N. Y. 84.

In order to warrant an arrest the process must so describe the person that the officer may know whom to arrest, and that the party whose liberty is threatened may know whether or not he is bound to submit. It is no defense to an action for false imprisonment to show that although the wrong person was described the right party was arrested. *Miller v. Foley*, 28 Barb. 630. See also *Mead v. Hawes*, 7 Cow. 332; *Griswold v. Sedgwick*, 6 Cow. 456, 1 Wend. 126; *Scott v. Ely*, 4 Wend. 555; *Cooter v. Bronson*, 67 Barb. 444.

Where a warrant recites a complaint against John Miller and commanded the officer to arrest "the said William Miller," it was held that the warrant afforded no justification to the officer in arresting John Miller, although it was proven he was the person intended. *Miller v. Foley*, 28 Barb. 630.

The defendant cannot justify the arrest of the plaintiff by a wrong name, although he actually was the person intended to be arrested, unless it is shown that he is known as well by one name as by the other. *Griswold v. Sedgwick*, 1 Wend. 126, 6 Cow. 456.

The arrest of a person by the wrong name cannot be justified, although he was the person intended, unless it can be shown that he was known by both names. So held in a case where a warrant was issued against "John Doe, the person carrying off the cannon," and was intended as against Levi Moore, who was, when

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the warrant was issued, in the act of carrying off the cannon, and for whom it was intended. *Mead v. Hawes*, 7 Cow. 332, citing *Griswold v. Sedgwick*, 6 Cow. 456.

A misnomer in a warrant of the person arrested subjects those acting under it to an action for false imprisonment. So held in a case where the name of the plaintiff was Eveline, and the warrant issued was against Emeline, although there was no doubt but that the plaintiff was the person against whom the warrant was issued. *Scott v. Ely*, 4 Wend. 555.

See also cases under title "Imprisonment by Various Classes of Persons — by Judicial Officers — by Legislative Bodies and Judges."

If the law under which a warrant was issued is unconstitutional it is no protection to the defendant, although he acted in good faith. *Williams v. Garrett*, 12 How. Pr. 456.

As to the liability of attorneys and others procuring the issuance of void process, and also liability for the issuance of voidable process, together with the distinction between void and voidable process, see *Fischer v. Langbein*, 103 N. Y. 84.

An action lies for an arrest under a voidable process, which is set aside by the court for irregularity. *Ackroyd v. Ackroyd*, 3 Daly, 38.

If a judge acquire jurisdiction and the plaintiff was arrested under his warrant, he cannot take advantage of any irregularity in the proceedings. *Stanton v. Schell*, 3 Sandf. 323.

An action for false imprisonment lies for the arrest under voidable process which is set aside by the court as irregular. *Chapman v. Dyett*, 11 Wend. 33.

The fact that the defendant was a sheriff in another State, and acted upon a bench warrant issued upon an indictment found in that State, will not authorize him to arrest a person within this State and carry him beyond our boundaries. In so acting he is to be treated as a private person acting without legal process. And, moreover, one who has arrested another without process, or upon void process, cannot detain him upon a valid process until he has first restored said party to the condition he was in at the time of the arrest. *Mandeville v. Guernsey*, 51 Barb. 99.

As to the liability of a constable acting on a warrant void because outside of the limits of the magistrate's jurisdiction, see *Greene v. Rumsey*, 2 Wend. 611.

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An arrest by a police officer at night on a warrant for a misdemeanor upon which no direction for such arrest is indorsed by the magistrate renders him liable for false imprisonment. *Murphy v. Kron*, 20 Abb. N. C. 259.

An illegal arrest on such an insufficient warrant cannot be justified as an arrest for another offense. *Murphy v. Kron*, 20 Abb. N. C. 259.

The distinction between void and irregular process is pointed out in *Fischer v. Langbein*, 2 St. Rep. 768. In regard to the liability of persons causing the issuance of process the court says: "In all cases where the court has acquired jurisdiction in an action or proceeding its orders made or judgments rendered therein are valid and enforceable, and afford a protection to all persons acting under them, although they may afterward be set aside and reversed as erroneous. Errors committed by the court upon a hearing or proceeding which it is authorized to hear, but not affecting any jurisdictional fact, do not invalidate its orders, or authorize a party to treat them as void, but can be taken advantage of only by appeal or motion in the original action."

So held where the plaintiff was arrested as for a contempt of court and where the determination of the Special Term that a process should issue was reversed. The Court of Appeals held that the decision of the Special Term was a decision upon a simple question of law; that the court had jurisdiction of the parties and the subject-matter and had authority to determine whether contempt had been committed or not, and that, therefore, the parties procuring the process were protected. *Fischer v. Langbein*, 103 N. Y. 84.

One who applies to a judge for an attachment because of the neglect of a judgment debtor to appear and be examined in supplementary proceedings is liable to false imprisonment in case the attachment is void for want of jurisdiction in the judge, or for any other cause. *Miller v. Adams*, 52 N. Y. 409, 7 Lans. 131. For the same principle, involving illegal arrest under Non-Imprisonment Act, in a case where the judge did not obtain jurisdiction, because there was no affidavit, and where the person instigating the imprisonment was held liable, see *Vredenburg v. Hendricks*, 17 Barb. 179.

Where no contempt is made out the attachment is absolutely void, and the person causing it to be executed is liable for false

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imprisonment, and the action of the plaintiff cannot be interfered with by imposing a condition that the plaintiff should not sue for false imprisonment on vacating the attachment. So held in a case where attachment issued for failure to obey a subpoena issued under an act which gave no authority to compel attendance of witnesses. *Matter of Bradner*, 87 N. Y. 171.

An order for the discharge of an imprisoned debtor must be made by the court, and hence if an order does not show on its face whether it was made by the court or a judge out of court, the sheriff is not liable for false imprisonment upon such an order, especially if such debtor is advised that the order is defective. *Hayes v. Bowe*, 65 How. Pr. 347, 12 Daly, 193.

In respect to an arrest made by an officer upon information submitted before a magistrate, who issued a warrant thereon, Her-rick, J., in *Hewitt v. Newburger*, 66 Hun, at p. 232, 20 N. Y. Supp. 913, says: "Courts of minor criminal jurisdiction are courts where people are expected and invited to initiate prosecutions without counsel — and it is the policy of the law to encourage them to do so; and the proceedings there should be so regulated that the unlettered and unlearned may enter freely, without fear that their ignorance of forms of law and its terms may lead them into greater dangers or difficulties than those from which they seek protection or redress. A plain statement of the acts of which they complain, without stating the evidence, it seems to me, is sufficient. The magistrate then becomes the responsible party, he is to determine from the statement, or information, whether the warrant should issue, and he, not the person lodging the information, is responsible for its form. The person lodging the information being liable in an action for malicious prosecution, if he willfully, corruptly, or maliciously misleads the magistrate by any false statement in his information." Reversed 141 N. Y. 238.

The defendant made a complaint, under the Game Law, on which a warrant was issued and plaintiff arrested. Plaintiff had violated sections 210–217 of the Game Law, which forbid trespassing upon private grounds for the purpose of hunting, fishing, etc., and section 217 provides that for violation of such article the person is liable to exemplary damages to not more than \$25. The arrest was made under section 246, providing an arrest for violation of the Game Law. *Held*, that the latter section was applicable to a criminal offense and did not warrant an arrest

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for a trespass which was a civil action, and, therefore, the defendant was liable. *Stahl v. Roof*, 164 N. Y. 162.

**ARTICLE VI.****LIABILITY OF JUDICIAL OFFICERS.**

The liability of a magistrate or judge has been considered under chapter V relating to exemptions from liability for torts, article III of that chapter treating of judicial and quasi-judicial officers and proceedings.

In view of the fact that only the leading authorities with regard to the liability of judicial officers were cited under that head, attention will be called to the authorities bearing upon the subject, although necessarily involving somewhat of repetition.

The foundation of exemption of judicial officers lies in the rule thus recently formulated. In the absence of malice, persons acting in a quasi-judicial capacity are not liable for errors of judgment in erroneously determining matters in their jurisdiction affecting the personal or property rights of others. *Lurman v. Jarvie*, 82 App. Div. 37 (44).

The rule was laid down in *Weaver v. Devendorf*, 3 Den. 117, that a public officer is not responsible in a civil suit for a judicial determination in a matter over which he had jurisdiction, however erroneous it may be or however malicious the motive which produced it. This language is cited in *East River Gas Light Co. v. Donnelly*, 93 N. Y. 557, Danforth, J., adding: "The principle upon which the rule rests was applied by the late Supreme Court in the case of *Weaver v. Devendorf*, 3 Den. 117, sustained by a great array of authorities, to which many later ones might be added, but none to the contrary. These authorities are cited and followed in *Hommert v. Gleason*, 38 St. Rep. 342, where it is said that it is elementary law that no judge or magistrate can be held responsible in a civil suit for a judicial determination, however erroneous.

A judge who is required to pass upon a question as to which different minds might reach different conclusions cannot be held liable for false imprisonment for an error in his decision when made by him in good faith and without malice, even though an appellate court subsequently reverses his decision and holds that the judge had no power to render or enforce the same. So held



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where the plaintiff, convicted of a crime punishable with a fine or imprisonment, having paid the fine, was subsequently sentenced to imprisonment. *Lange v. Benedict*, 8 Hun, 362. See this decision for a discussion of the judicial function.

The judge of a superior court or court of general jurisdiction is not liable for a judicial act in a matter within his jurisdiction, although the act is in excess thereof. So held where the defendant, a judge of the United States District Court, sentenced the plaintiff to pay a fine and be imprisoned where the crime was punishable only by fine or imprisonment, and where upon *habeas corpus* the sentence was vacated by the defendant and the plaintiff resentenced to imprisonment only. *Lange v. Benedict*, 73 N. Y. 12, affirming 8 Hun, 362, reversing 48 How. Pr. 465.

Where a warrant is issued by a judicial officer upon an affidavit giving him jurisdiction, in issuing the order he acts judicially and makes a judicial determination. Neither the judge nor the person furnishing the affidavit are liable for false imprisonment, although the warrant is subsequently set aside upon discovery of other facts. *Marks v. Townsend*, 97 N. Y. 596.

See this case for a discussion of the theory upon which this determination is founded.

In *Fischer v. Langbein*, 103 N. Y. 84, the rule as to jurisdiction is summed up as follows: "The power of the court to entertain jurisdiction of an action or proceeding does not depend upon the existence of a sustaining cause of action, but upon the performance by the party of the prerequisites authorizing it to determine whether one exists or not."

At p. 94 of the opinion the court points out the proper rule, after a consideration of the authorities, as follows: "The rule to be deduced from these authorities seems to be that when a court is called upon to adjudicate upon doubtful questions of law or determine as to inferences to be drawn from circumstances, reasonably susceptible of different interpretations or meanings, and calling for the exercise of the judicial function in their determination, its decision thereon does not render an order or process based upon it, although afterward vacated or set aside as erroneous, void, or subject the party procuring it to an action for damages thereby inflicted. Where the jurisdiction of the court is made to depend upon the existence of some fact of which there is an entire absence of proof, it has no authority to act in the

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premises, and if it, nevertheless, proceeds and entertains jurisdiction of the proceeding, all of its acts are void and afford no justification to the parties instituting them as against parties injuriously affected thereby. But if the facts presented to the court call upon it for the exercise of judgment and reason upon evidence which might in its consideration affect different minds differently, a judicial question is presented which, however decided, does not render either party, or the court making it, liable for the consequences of its action."

In discussing the liability of a judicial officer the rule is thus stated by Peckham, J., in *Austin v. Vrooman*, 128 N. Y. 235: "It is not a question of jurisdiction to proceed with the trial, notwithstanding the demand, but it is a question of jurisdiction to decide whether he has or has not that right. Manifestly he does not, as a matter of law, acquire jurisdiction to proceed by deciding that he has it; but, being confronted with the question of jurisdiction, has he the power to decide it so far that his erroneous decision that he has it exempts him from liability on the ground that he has only made a judicial error or an error of judgment upon a question of law, which he was bound to decide?"

It will be seen that this decision holds that under some circumstances the decision of a justice as to whether or not he has jurisdiction is a determination of the matter apparently pending before him and over which he has jurisdiction, and that he will be protected in his decision, although it be erroneous. The court distinguishes this case from cases where a justice decided to exercise power that he does not and never did possess, as where a justice of the peace proceeded to try a civil action for assault and battery. *Woodward v. Paine*, 15 Johns. 492. In such case the justice never obtained jurisdiction over the subject-matter, and he could not obtain it by deciding that he had it. Where a justice has no jurisdiction over the subject-matter he acts as a trespasser from the beginning in assuming it, and his decision that he has it is no protection to him.

See this case for discussion of the authorities upon this question.

In *Wilson v. Mayor*, 1 Den. 595, it is held that where a duty, judicial in its nature, is imposed upon a public officer or municipal corporation, a private action will not lie for misconduct or delinquency in its performance, even if corrupt motives are charged.

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A judicial officer is not liable to an action for false imprisonment for convicting plaintiff of a criminal offense as long as his conviction remains unreversed, unless the plaintiff shows the fact that the conviction was obtained by fraud or conspiracy in which the court participated. *Cuniff v. Beecher*, 84 Hun, 140, 32 N. Y. Supp. 1067.

The general rule is that where a judge who has jurisdiction errs in his judgment as to whether the facts presented do or do not confer jurisdiction, he is not liable for false imprisonment, though he make an error of judgment. *Nowak v. Waller*, 31 St. Rep. 458, 10 N. Y. Supp. 199, citing *Ayres v. Russell*, 50 Hun, 282, 3 N. Y. Supp. 338.

A justice of the peace in issuing a criminal warrant is exercising general jurisdiction over the subject-matter, and not special jurisdiction over the particular offense. All that is required to protect him in so doing is that the evidence produced is colorable, or something that the judicial mind is called upon to act in determining the question of probable cause. It is not necessary for him to state in the criminal warrant the evidence by which the charge is supported. All that is required in that particular is that he recite the accusation. *Pratt v. Bogardus*, 49 Barb. 89.

In regard to imprisonment by a magistrate, see the opinion of Herrick, J., in *Hewitt v. Newburger*, 66 Hun, 232, 20 N. Y. Supp. 913, quotation from which is given in last subdivision.

Where a magistrate issues a warrant on a complaint for violation of the statute as to the observation of Sunday, it was held that he was not liable for false imprisonment, although he might have misjudged as to the facts bringing the offense within the meaning of the statute. The court says: "It cannot be doubted but that the justice, by means of the complaint in this action and the warrant issued thereupon, acquired jurisdiction over the subject-matter and the person of the defendant, and that his error, if any, was an error of judgment." *Stewart v. Hawley*, 21 Wend. 552.

In *Kenner v. Morrison*, 12 Hun, 204, it was held that where a justice of the peace committed plaintiff to the county jail upon his failure to give bail, such commitment was an error of judgment, and that as he had jurisdiction of the person and of the subject-matter, he was protected in an action for false imprisonment.

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A justice of the Supreme Court who grants an order of arrest upon affidavits setting forth but slight evidence of the requisite facts and which on a motion to set aside, the order would be insufficient to support, is nevertheless protected, as is also the party obtaining it and the officer making the arrest under it. Such order is merely erroneous. *Hall v. Munger*, 5 Lans. 100.

An officer authorized to grant an arrest and to hold to bail acts judicially, and is not liable for false imprisonment in consequence of such an arrest upon process, where a case is presented for the exercise of his judgment. *Harman v. Brotherson*, 1 Den. 537.

In *Sands v. Benedict*, 2 Hun, 479, 5 T. & C. 19, a justice of the peace was held to be justified in committing the plaintiff in default of his giving security to keep the peace, though made subsequent to an affray which had been witnessed by the justice and without other evidence than his own senses. It was held that the rule requiring sheriffs and constables to make an arrest to prevent a breach of the peace at the very time it is committed has no application to an arrest by a judicial officer, charged with the duty of compelling persons to keep the peace.

Where a judge in a proceeding before him as to the commitment of an alleged insane person erred in his judgment as to whether the facts presented did or did not confer jurisdiction upon him, he is not liable in an action for false imprisonment, although he makes an error in his judgment. *Ayres v. Russell*, 50 Hun, 281, 3 N. Y. Supp. 338.

Upon this subject the court said: "Why then cannot the magistrate be pursued by the injured individual? Because when information was presented to him it was his duty to decide what his duty was respecting it. He had jurisdiction of that question, and his wrong decision upon it was a judicial error. He had a duty to perform and the law does not punish him for a mistake in trying to do right." Citing *Lange v. Benedict*, 73 N. Y. 35.

A justice who issues a process outside of his jurisdiction is liable for false imprisonment, for an arrest upon such process, even though the person arrested makes no objection to the informality. The justice is not liable, however, if a person appear voluntarily and submits to an examination. Where a statute requires that a certain person shall execute process, and it is executed by another, such a proceeding is void. *Reynolds v. Orvis*, 7 Cow. 268.

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If a justice issue a warrant without complaint on oath, showing the commission of an offense, he is liable for false imprisonment. *Wilson v. Robinson*, 6 How. Pr. 110. So, too, a justice at Special Sessions who convicts and sentences a person for an offense of which the court has not jurisdiction is liable to false imprisonment. *Wait v. Green*, 5 Park. Ch. 185. So if a warrant of a magistrate is void upon its face, in that it states no offense, the magistrate is liable. *Blythe v. Tompkins*, 2 Abb. Pr. 468. A justice is liable, although he has jurisdiction, if he issues a warrant to a constable who is not authorized to serve it. *Reynolds v. Orvis*, 7 Cow. 269.

Where a justice issues a warrant on a criminal charge without sufficient evidence of the crime, both the justice and the complainant are jointly liable in an action for false imprisonment. *Comfort v. Fulton*, 39 Barb. 56, 13 Abb. Pr. 276.

In *Warner v. Perry*, 14 Hun, 337, the defendant, a justice of the peace, was held liable for issuing a warrant under a statute relating to cruelty to animals, where plaintiff did not state facts by which an offense under the act was made out.

A justice of the peace was held liable for false imprisonment, in issuing a warrant of arrest against the putative father of a bastard child, where the warrant was issued on the application of an attorney, representing that he had authority from the overseers of the poor, when in fact he had no such authority. This is so, even though the overseers of the poor after the arrest consented to the proceeding. *Wallsworth v. McCullough*, 10 Johns. 93.

Where one is arrested, tried, and convicted in a court which has no jurisdiction, the imprisonment cannot be justified by saying that the evidence would have convicted him of some other offense of which the court had jurisdiction. *Wait v. Green*, 5 Park. Cr. 185.

If there is enough evidence to warrant a magistrate in taking action, his action is judicial, and he and the officer executing the order are protected. *Minehan v. Thomas*, 9 Week. Dig. 32.

For a case where the facts stated upon a sworn complaint were sufficient to render the action of the justice in passing upon the sufficiency of the complaint a judicial one and protect him, see *Bocock v. Cochran*, 32 Hun, 521.

For a case where a deposition before a magistrate was held to be sufficient to warrant him in issuing a warrant of arrest, see

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*McKelvey v. Marsh*, 63 App. Div. 396, 71 N. Y. Supp. 541, 105 St. Rep. 541.

Where a justice of the peace before whom the plaintiff was arraigned had jurisdiction both of the crime and the person of the defendant, any defect or irregularity in the warrant of arrest or in the deposition is waived by the voluntary appearance of the defendant. \* \* \* Even if the justice erred in his judgment as to the sufficiency of the deposition the prosecutor will be protected from civil liability. *Jones v. Foster*, 43 App. Div. 33, 59 N. Y. Supp. 738; *Austin v. Vrooman*, 128 N. Y. 229; *Swart v. Rickard*, 148 N. Y. 264.

Where a justice of the peace has jurisdiction to issue a process and also jurisdiction of the subject-matter, he acts judicially in passing upon the sufficiency of the evidence upon which he issues the process, and is not liable in an action for false imprisonment. *Harrison v. Clark*, 4 Hun, 685. To the effect that a justice acts judicially in passing upon the sufficiency of evidence, see *Stewart v. Brown*, 16 Barb. 667; *Harman v. Brotherson*, 1 Den. 537; *Payn v. Barnes*, 5 Barb. 465.

A justice of the peace who acts without acquiring jurisdiction is a trespasser; but once having acquired jurisdiction an error in judgment does not subject him to an action. So held where a justice granted an adjournment to a plaintiff not entitled to it and subsequently rendered judgment and issued execution upon which he was imprisoned. *Horton v. Auchmoody*, 7 Wend. 200.

Where a complaint stated facts from which a justice might have concluded plaintiff had committed an offense under the statute, it was held that the justice acquired jurisdiction and was not liable in an action for false imprisonment (*Gardner v. Bain*, 5 Lans. 257) upon the ground that the justice, by means of the complaint and the warrant issued thereon, acquired jurisdiction over the subject-matter and the person of the defendant, and that the error, if any, was an error of judgment, citing *Harman v. Brotherson*, 1 Den. 537; *Matter of Faulkner*, 4 Hill, 598; *Landt v. Hiltz*, 19 Barb. 283; *Stanton v. Schell*, 3 Sandf. 328; *Von Latham v. Libby*, 38 Barb. 339; *Skinnion v. Kelley*, 13 N. Y. 355.

A recorder of a city having jurisdiction of a case for the violation of an ordinance acts judicially in granting a warrant and cannot be held liable for false imprisonment. So held where an

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ordinance of the city of Binghamton in relation to fire limits and the erection of buildings therein were illegal, and where a violation of such ordinance was a misdemeanor. *Brunner v. Downs*, 43 St. Rep. 824, 63 Hun, 626, 17 N. Y. Supp. 633.

In *Miller v. Adams*, 7 Lans. 136, the court says that the following proposition may be considered as established:

*First.* That a judge of a court of record is not civilly liable for any error of judgment he may commit, although it may be intentional.

*Second.* A court or officer of inferior jurisdiction is liable to the party injured when he or it acts without having jurisdiction of the subject-matter and of the person of the party proceeded against, unless the question whether jurisdiction is obtained is a judicial one, to be determined by such court or officer, in which case the decision is a protection to him or it and to the party.

*Third.* When the evidence presented to the court or officer has a tendency to prove the facts required to be proved to confer jurisdiction, the decision protects the court or officer and also the party.

*Fourth.* When a party or his attorney may lawfully issue process against the person or property of a party, they are liable if the process is issued in a case not authorized by law; and when it is issued in a case in which it may lawfully issue, but it is issued irregularly, they are liable only after it is set aside for such irregularity. While it remains in force it is a protection.

*Fifth.* While it is true that process issued by a court or officer in favor of a party upon proof, to be made to the satisfaction of such court or officer, although it may be issued erroneously, is a protection to him; yet if he interferes in the arrest beyond taking out the process and delivering it to an officer to be executed, he is liable for such unauthorized interference.

*Sixth.* The party who maliciously and in bad faith extends the jurisdiction of a court or officer to a case to which it cannot lawfully be extended is liable to the party injured thereby.

Affirmed 52 N. Y. 409, cited *Marks v. Townsend*, 97 N. Y. 598; *Fischer v. Langbein*, 103 N. Y. 92.

Chapter 601, Laws 1895, abolishing the office of police justice in the city and county of New York, is constitutional, and thus a prior incumbent of that office who issues a warrant after his office has been abolished is liable for false imprisonment. *Stenson v. Koch*, 152 N. Y. 87, affirming 5 App. Div. 621.

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It has been held that where a person is arrested upon a criminal charge without competent evidence of guilt, both the magistrate and the prosecutor are jointly liable for false imprisonment. *Comfort v. Fulton*, 13 Abb. Pr. 276, 39 Barb. 56.

A justice of the peace who unlawfully issues a body execution is liable in damages for an arrest made thereon by a constable. *Campbell v. Kelly*, 20 Week. Dig. 160.

A justice who unlawfully issues a body execution is liable for arrest. *Campbell v. Kelly*, 20 Week. Dig. 160.

A justice of the peace cannot adjudge a person in contempt and punish him save in a case prescribed by statute. In order to give the justice jurisdiction to punish for contempt for a refusal to answer a proper and pertinent question there must be an oath of the party as to the materiality of the testimony; therefore, where no such oath is made the justice is liable to an action for false imprisonment for a commitment as for contempt. *Rutherford v. Holmes*, 66 N. Y. 368, affirming 5 Hun, 317.

In *Percival v. Jones*, 2 Johns. Cas. 49, it was held that where a justice of the peace acted ministerially at the request of a party, he was not liable; but where he acted outside of his jurisdiction in a judicial capacity, he was liable for false imprisonment. This case has been frequently cited and commented upon.

In *Hoose v. Sherrill*, 16 Wend. 33, at p. 42, Bronson, J., said that what was said by the court in *Percival v. Jones*, in relation to the justice acting as a ministerial officer in issuing process, and as such not being responsible, must be understood in reference to the particular circumstances of that case, in which it was questionable, to say the least, whether the defendant ought to have been held liable.

*Percival v. Jones*, *supra*, is cited in *Sagendorph v. Shult*, 41 Barb. 102, where the distinction is made that the issuing of the summons is a ministerial and not a judicial act, and that the time when the question of jurisdiction of the act is judicially determined is upon the return day.

*Hess v. Morgan*, 3 Johns. Cas. 84, distinguishes *Percival v. Jones*, upon the ground that in the latter case there was a waiver on the part of the defendant of the right of exemption.



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**ARTICLE VII.****LIABILITY FOR ACTS OF SERVANTS AND AGENTS.**

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**SUBDIVISION 1.****Liability of Corporations for Acts of Servants.**

The liability of a corporation for an arrest made by one of its employees is very fully considered in *Mulligan v. New York & Rockaway Beach R. R. Co.*, 129 N. Y. 506, and *Palmeri v. Manhattan Ry. Co.*, 133 N. Y. 261.

In the *Mulligan Case* it was held that while the law is settled that the common carrier by its contract of transportation undertakes to protect the passengers against any injury arising from the negligence or willful misconduct of its servants, while engaged in performing a duty which the carrier owes to him, citing *Stewart v. B. & C. Co.*, 90 N. Y. 588, yet upon the facts disclosed by the record the case does not come within the principle there established.

In the *Palmeri Case*, the court considered the *Mulligan Case* and said: "What materially distinguishes the present from the *Mulligan Case* is that there the servant of the company was not acting for the protection of the company's interests, but went quite outside of the line of his duty to perform a supposed service to the community by procuring the arrest of criminals whom he knew the authorities were endeavoring to apprehend. That did not enter into the transaction of his employer's business; whereas, here the ticket agent clearly was engaged about the company's affairs, but, in the belief of the jury, unlawfully detained the plaintiff and insulted her by slandering her character."

Both these cases are considered in opinion of Hatch, J., in *Penny v. N. Y. C. & H. R. R. Co.*, 34 App. Div. 10, 53 N. Y. Supp. 1043, to the general rule that it matters not that the servant's acts were reckless and unnecessary, if injury was inflicted, or if he passed his authority or departed from his instructions, or through infirmity of temper added slander to his other wrongdoing, all these are unavailing to shield the master so long as

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the things that are done are done in the prosecution of the business of the master, even though such acts be not only negligent but wanton and willful, citing *Burns v. Glens Falls R. R. Co.*, 4 App. Div. 426, 38 N. Y. Supp. 856. Unless the servant is acting within the scope of the authority, the master is not responsible for the servant's acts. Judgment in favor of plaintiff was reversed upon the ground that the acts of the person making the arrest did not appear to have been done within the scope of his authority. That it was quite as consistent with the conclusion that he acted from personal motives and for his own purposes as that he acted in the prosecution of any matter committed to his care by the defendant.

In *McKay v. Hudson River Line*, 56 App. Div. 201, 67 N. Y. Supp. 651, *held*, that the action of a purser of a steamboat, in aiding in the search of a woman who, it was claimed, had stolen property, was not within the scope of his authority, that the act was not done in the performance of any duty which he owed the defendant, and that he had no authority from the defendant to act by reason of the woman having at the time of the alleged arrest passed from the pier.

Where there was a dispute between a passenger and a conductor, as to whether the passenger paid his fare, and the conductor had the passenger arrested, it was held that he was acting within the scope of his authority, and that the railroad company was liable for the imprisonment. *Roun v. Christopher, etc., Ry. Co.*, 34 Hun, 471.

A railroad company is liable for false imprisonment by one of its employees while engaged in its business, whether the same is willful or malicious. One who is placed by such a company on its station platform with power to suppress disturbance is an employee of the company, and the company is liable for the misuse of his authority. *Shea v. Manhattan Ry. Co.*, 27 St. Rep. 33, 7 N. Y. Supp. 497, citing *Stewart v. Brooklyn & Crosstown Ry. Co.*, 90 N. Y. 588.

In *Hamel v. Brooklyn, etc., Ry. Co.*, 6 N. Y. Supp. 102, the defendant was held liable for an illegal arrest by its servant, whether the defendant authorized the arrest or not. "If its employee acted within the general scope of his duty, unjustifiably caused it (the arrest), the defendant must respond."

A railroad company is bound to protect its passengers while in transit from the violence committed by strangers and copassengers,

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and must protect them absolutely against the misconduct of its own employees and servants. Hence, if a passenger sustains damage by reason of the misconduct of an employee of the railroad company, it is immaterial whether the servant was acting within the scope of his employment or not. So held where the plaintiff was unlawfully arrested while a passenger on the defendant's train by a detective in the employ of the defendant on a charge of theft. The case proceeds upon the theory that the wrong is in violation of contract of carriage. As to whether the act is in violation of such contract is for the jury. *McLeod v. N. Y., C. & St. L. R. R. Co.*, 72 App. Div. 116, 76 N. Y. Supp. 347, 110 St. Rep. 34.

Where a special officer of a railroad testified that his duties were to watch for people stealing coal, and if he caught them to lock them up,—*Held*, that it could not be deemed a matter of law that in arresting a person several blocks from the premises of the railroad company he acted outside of the scope of his authority. That presuming his instructions limited his authority to the premises of the railroad company, they were, nevertheless, responsible because the act was within the general scope of the employment, and even though some particular direction had been disregarded. *Kastner v. L. I. Ry. Co.*, 76 App. Div. 323, 78 N. Y. Supp. 469, 112 St. Rep. 469.

For a case where a railroad corporation was held liable for the wrongful imprisonment of plaintiff by a policeman and detective in the employ of defendant, see *Fitzpatrick v. N. Y. & M. B. R. R. Co.*, 5 N. Y. Supp. 685, affirmed without opinion 125 N. Y. 682. For former appeals in the same case, see 15 Week. Dig. 506, affirmed 101 N. Y. 617.

Although defendant corporation provides a room in its premises for a police station, it is not responsible for the arrest of a person not a guest by an officer who is not shown to have been employed by the defendant. *Fitzpatrick v. N. Y. & N. B. R. R. Co.*, 15 Week. Dig. 506.

Where a railroad corporation may lawfully lease its road to another company, and the lessor takes possession and manages and operates the railroad, the lessor is not liable to a passenger for injuries sustained by reason of the wrongful acts of the lessee's servants. *Fisher v. Metropolitan El. Ry. Co.*, 34 Hun, 433.

*Mott v. Consumers' Ice Co.*, 73 N. Y. 543, though not a case involving false imprisonment, is in point upon the general ques-

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tion as to when a servant charges his master with liability for his acts. The test is whether the wrongful act was in the course of the employment, or outside of it.

See also *Stewart v. Brooklyn, etc., Ry. Co.*, 90 N. Y. 588, which, although involving a question of liability for assault and battery, is relevant on the question as to when a servant is acting within the scope of his authority. See also *Dwinelle v. N. Y. C. & H. R. R. Co.*, 120 N. Y. 117.

On the question of the liability of a corporation for the tortious act of its servant, see also *Rounds v. D., L. & W. R. R. Co.*, 64 N. Y. 129. This case does not involve, however, the question of false imprisonment. The question as to whether a servant is acting within the scope of his authority so as to bind his master is ordinarily to be determined by the jury.

Where the plaintiff, riding upon the defendant's railway, had originally purchased a ticket, but lost it before reaching his destination, and where he was arrested while attempting to pass through the gate at his destination without a ticket, it was held that the detention was unlawful, and that the defendant was responsible for the act of the gatekeeper. The case turns upon the theory that at the most the plaintiff was a debtor to the defendant for the amount of his fare, and that it could not be enforced by imprisonment, but that the defendant should sue for the amount thereof. The court further says: "If the defendant had the right to detain him to enforce payment of the fare for ten minutes, it could detain him for one hour, or a day, or a year, or for any time until compliance with its demand. That would be arbitrary imprisonment by a creditor without process or trial, to continue during his will until his debt should be paid. Even if a reasonable detention may be justified to enable the carrier to inquire into the circumstances it cannot be to compel payment of fare." *Lynch v. Metropolitan El. Ry. Co.*, 90 N. Y. 77, affirming 24 Hun, 506.

For a case where defendant, a corporation, was held liable for false imprisonment by instigating the arrest of servants of the corporation, see *Midford v. Kann*, 32 App. Div. 228, 52 N. Y. Supp. 995.

For a case where it was held that the arrest of the plaintiff was not shown by the record to be at the instigation of the defendant corporation, see *Noad v. Canadian Pacific R. R. Co.*, 56 App. Div. 33, 67 N. Y. Supp. 265, 101 St. Rep. 265.

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**SUBDIVISION 2.****Liability of Individuals and Copartners for Acts of Servants.**

*Mallach v. Ridley* is reported on first appeal, 43 Hun, 336, where the judgment was reversed for error in charge and excessive damages. Second appeal is reported, 24 Abb. N. C. 172, where it was held that inasmuch as a storekeeper invites the public to enter his premises, and subject themselves to the custody and control of his subordinates, like a carrier of passengers, he should be held responsible like a carrier for all the acts of the subordinates toward one who accordingly enters, even when such acts are committed within the strict line of employment. *Held*, that where a floorwalker was accustomed to see customers and give directions to the saleswomen, and also to look out for thieves and pickpockets, and to watch people and ascertain if they conduct themselves lawfully, it was sufficient to make it a question for the jury whether he was instructed to detain suspected persons. The court said: "The floorwalker evidently had the right to arrest and apprehend thieves, and under that authority if he apprehended an innocent person his employers are necessarily responsible. They cannot confer such an authority upon the employee, and claim the benefits of his action when he acts advisedly and absolve themselves from all risk when he acts on insufficient evidence."

In *Mali v. Lord*, 39 N. Y. 381, it was held that while a man is responsible civilly for the wrongful act of his servant committed in the transaction of his business, he is not responsible for the willful injury committed by the servant while so engaged, unless he so act by the express or implied authority of his employer; and that where the superintendent and clerks of the firm directed a policeman to arrest and examine the person of a woman suspected of stealing goods which was so done without the knowledge or express or implied knowledge of the owners of the goods, that the master was not liable. That the servant is not impliedly authorized to do that which the master himself, being present, would not be authorized to do.

This case is distinguished in *Palmeri v. Manhattan Ry. Co.*, 133 N. Y. 261, opinion Gray, J., in which he says that Judge Andrews in *Rounds v. D., L. & W. R. R. Co.*, 64 N. Y. 129, points

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out the distinguishing principle of the cases as to the authority of a servant.

In *Dupre v. Childs*, 52 App. Div. 306, at p. 309, 65 N. Y. Supp. 179, Ramsey, J., says of *Mali v. Lord*, *supra*, that while it was undoubtedly well decided upon the facts made there to appear, it would not now be said to be an accurate statement of the law as to the responsibility of the master as to the wrongful act of his servant. That the later cases which are cited in the opinion have laid down the rule in such different terms that *Mali v. Lord* must be assumed to have been considerably limited. *Dupre v. Child* was affirmed 169 N. Y. 585, on opinion below, so that *Mali v. Lord* may be regarded at least as limited by the Court of Appeals.

It was held that where the defendant's cartman caused the plaintiff's arrest for refusing to pay the value of goods marked "C. O. D." by error of the defendant, when, as a matter of fact, the only sum due was difference between the price of an article delivered and one returned, the defendant was liable. The driver acted within the scope of his authority. *Craven v. Bloomingdale*, 54 App. Div. 266, 66 N. Y. Supp. 525, 100 St. Rep. 525, affirming 30 Misc. Rep. 650, reversed 171 N. Y. 439, where it is held that while a master is liable in compensatory damages for an illegal arrest caused by his servant, if his manner of conducting business justified the jury in believing that the servant in causing such arrest was acting within the scope of his employment, and discharging the ordinary duties upon him, the employer cannot be held liable for punitive or vindictive damages, and that it is reversible error for the trial court, after instructing the jury as to the law of compensatory damages, to instruct them that they also had the power, if they thought proper, to award punitive damages, without further instructing them that such damages should not be awarded unless there was proof showing that the acts of the servant were wanton, oppressive, or malicious, and that the master was implicated with the servant therein, or had either expressly or impliedly authorized or ratified them.

The court distinguishes the case from *Stevens v. O'Neil*, 51 App. Div. 364, 64 N. Y. Supp. 663, affirmed 169 N. Y. 375, saying, that in the *Stevens Case*, the plaintiff had been arrested in the store of the defendant under circumstances peculiarly distressing and humiliating, and citing from opinion of Van Brunt,

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P. J., in the Appellate Division, as follows: "Although there was no evidence of any express malice against the plaintiff individually, the act was done in pursuance of a system which had been adopted in that store, and if that system was such as to place an innocent customer in the position in which the plaintiff's evidence showed that she was placed, the jury had the right to say that the results of this system were of such a character as to require rebuke by way of punitive damages, in order that innocent people should not be placed in the position which this plaintiff was placed without any fault on her part."

The rule as to the master's liability for the arrest by a servant is thus laid down in *Fogarty v. Wanamaker*, 60 App. Div. 433, 69 N. Y. Supp. 883, 103 St. Rep. 883: "The better rule appears to be that while the master is not responsible for the willful wrong of the servant, not done with a view to the master's service, or for the purpose of executing his orders, if the servant authorized to use force against another, when necessary in executing his master's orders, and if, while executing such orders, through misconduct or violence of temper, the servant uses more force than is necessary, the master is liable. So if the master puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, he is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another."

Proprietors of a restaurant are liable for illegal arrest by a general manager. The existence of a rule that such manager should not leave the restaurant until he had been relieved does not excuse the proprietor from liability in a case where the manager had the plaintiff arrested on the sidewalk. *Dupre v. Childs*, 52 App. Div. 306, 65 N. Y. Supp. 179, 99 St. Rep. 179, affirmed 169 N. Y. 585, on opinion below.

A master is liable for false imprisonment by his servant while acting within the scope of his duty. So held where the defendant was a saloon-keeper, and the manager of his business caused arrest of plaintiff. *Fortune v. Trainer*, 47 St. Rep. 58, affirmed without opinion 141 N. Y. 605.

Where the defendant, the owner of a pleasure resort, made an

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agreement with one Pinkerton, under which the latter was to furnish the needed police, the defendant was held liable for the wrongful arrest of a ticket-taker on the charge of stealing tickets, the arrest being made by the captain of the police. *Clark v. Starin*, 47 Hun, 345. See Art. X, Subd. 4, "Arrest by Agent."

### ARTICLE VIII.

#### LIABILITY OF ATTORNEY AND CLIENT.

One who issues process does not become liable for acts in excess of the lawful authority of the officer acting thereunder. Therefore an attorney, acting under instruction from his client, unlawfully procuring the issuance of a body execution is not liable for damages by reason of his confinement by the sheriff among thieves and criminals. For that violation the sheriff alone is responsible. *Baker v. Secor*, 22 St. Rep. 97, 4 N. Y. Supp. 303.

It has been held that the circumstances of an attorney's name being subscribed to a process on which an illegal arrest is made, without other proof of his conduct, is not sufficient to charge him in an action for false imprisonment. *Griswold v. Sedgwick*, 1 Wend. 127.

Though it seems that where an attorney makes out an illegal writ and delivers it to the officer for execution, he is liable. Citing *Baker v. Braham & Norwood*, 3 Wils. 368.

Attorney and client procuring an illegal arrest are joint tortfeasors, and an assignment of the judgment against the attorney for false imprisonment to his client discharges the attorney. *Baker v. Secor*, 28 St. Rep. 923, 7 N. Y. Supp. 803, 22 St. Rep. 97, 4 N. Y. Supp. 303.

As to when attorneys are not liable for false imprisonment in opposing a motion to discharge plaintiff, who was arrested for a contempt, see *Fischer v. Langbein*, 103 N. Y. 84, affirming 13 Abb. N. C. 10.

A party liable for false imprisonment cannot escape liability by throwing the responsibility upon his attorney. *Ackroyd v. Ackroyd*, 3 Daly, 38.

Where a creditor directs the issuance of an illegal body execution he thereby becomes a joint tortfeasor with his attorney. *Baker v. Secor*, 22 St. Rep. 97, 4 N. Y. Supp. 303.

Where in a prior action the defendants had obtained attachment against the person of A., and their attorneys wrongfully in-



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structed the sheriff as to the identity of the person, so that he arrested the plaintiff, it was held that the defendants were not liable for the act of their attorney as he had no authority, either express or implied, to arrest the plaintiff. *Gearon v. Bank of Savings*, 50 N. Y. Super. 264.

It seems that the issuing of a body execution by an attorney for a judgment creditor is within the scope of his implied authority, and when such execution is issued and the debtor arrested in a case where it is not authorized, the client may be liable although there is no evidence that he directed the issuing of the execution. *Guilleaume v. Rowe*, 94 N. Y. 268, affirming 48 N. Y. Super. 169.

It was also held in that case that where a judgment creditor countermanded the execution and directed the sheriff to discharge the prisoner if he would sign a stipulation not to sue for false imprisonment, and the prisoner signed and was not discharged, that the release was void for duress. Compare *Welch v. Cochrane*, 63 N. Y. 181.

An attorney who causes a void or irregular process to be issued in a case which causes loss or injury to the party against whom it is enforced is liable for the damages occasioned thereby. In the case of void process the liability attaches when the wrong is committed, and no preliminary proceeding is necessary to vacate or set it aside, as a condition to the maintenance of the action. Where, however, the court has jurisdiction to award the process, and the same is irregular by reason of nonperformance by the party procuring, or of some preliminary requisite, the same must be regularly vacated or annulled by order of the court before an action can be maintained. In such cases the process is considered the act of the party and not that of the court, and he will be liable for the consequences. *Fischer v. Langbein*, 103 N. Y. 84, affirming 13 Abb. N. C. 10, 2 St. Rep. 768.

The court thereupon defines a void process as process in which "the court has no power to award, or has not acquired jurisdiction to issue in the particular case, or which does not in some material respect comply in form with the legal requisites of such process, or which loses its vitality in consequence of noncompliance with a condition subsequent, obedience to which is rendered essential. Irregular process is such as a court has general jurisdiction to issue, but which is unauthorized in the particular case by reason

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of the existence or nonexistence of some fact or circumstance rendering it improper in such a case. In all cases where a court has acquired jurisdiction in an action or proceeding its order made or judgment rendered therein is valid and enforceable, and affords protection to all persons acting under it, although it may afterward be set aside or reversed as erroneous. Errors committed by a court upon the hearing of an action or proceeding which it is authorized to hear, but not affecting any jurisdictional fact, do not invalidate its orders or authorize a party to treat them as void, but can be taken advantage of only by appeal or motion in the original action. *Fischer v. Langbein et al.*, 103 N. Y. 90, citing *Day v. Bach*, 87 N. Y. 56; *Simpson v. Hornbeck*, 3 Lans. 53; *Fischer v. Raab*, 81 N. Y. 235; *Rutherford v. Holmes*, 66 N. Y. 370.

## ARTICLE IX.

## ARREST BY MILITARY AUTHORITIES.

Civil courts have uniformly declined to interfere with acts affecting military rank or status, or for offenses against articles of war or military discipline. See *Johnstone v. Sutton*, 1 T. R. 546; *United States v. Mackenzie*, 1 N. Y. Leg. Obs. 227, 371. But as to a malicious exercise of authority by a military officer or for acts in excess of authority, though done in good faith, see *Tyler v. Pomeroy*, 8 Allen, 480; *Dynes v. Hoover*, 20 How. (U. S.) 65; *Wise v. Withers*, 3 Cranch, 337; *Mallory v. Merrit*, 17 Conn. 178; *Warden v. Bailey*, 4 Taunt. 67.

But in general great latitude is allowed in passing upon the legality of the acts of military officers in discharge of duty in times of public peril. See *Clow v. Wright*, Brayt. (Vt.) 118; *Teagarden v. Graham*, 31 Ind. 422; *Hawley v. Butler*, 54 Barb. 490; s. c., 48 Barb. 101; *Hickey v. Huse*, 53 Me. 493; *Oglesby v. State*, 39 Tex. 53.

If a court-martial arrest and imprison a private person for an offense even within its jurisdiction, it is false imprisonment. *Smith v. Shaw*, 12 Johns. 257.

Thus, where a person was arrested as a deserter, who turned out to be a civilian, the person who arrested him was held responsible. (English case.) 2 Addison on Torts (Wood's ed.), § 818.

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## ARTICLE X.

## DEFENSES.

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## SUBDIVISION 1.

## Want of Probable Cause.

For various cases involving the defense of probable cause, see authorities cited under previous articles.

The right to arrest without a warrant depends upon the relation of the attending circumstances to the specific question. There can be no general right to arrest citizens for an undisclosed offense. The statute requires the officer to inform the arrested person of his authority and the cause of his arrest, except where the person arrested is arrested in the actual commission of the crime. A man cannot be arrested for one cause and when that fails the defendant justify his arrest for another cause. So held, where the plaintiff was arrested on suspicion of having in his possession jewelry, not belonging to him, and such charge was made against him. On his examination at the headquarters, it was found that he was carrying concealed weapons, which is a misdemeanor. It was held that the arrest for the first cause could not be subsequently justified on the latter grounds. *Snead v. Bonnoil*, 49 App. Div. 330, 97 St. Rep. 553, 63 N. Y. Supp. 553, affirmed 166 N. Y. 325.

See *Savage v. McMillan*, 37 App. Div. 103, 55 N. Y. Supp. 1055, for a case where it was held that no probable cause was proven. A contractor engaged to tear down a public building was, by his contract, to have the benefit of the materials. While disposing of such material he was arrested on charge of grand larceny, preferred by superintendent of public parks. It was held that, under the circumstances, no probable cause was shown, and that the plaintiff was entitled to recover, the only question for the jury to consider being that of damages.

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In order that probable cause be a defense in an action for false imprisonment, it is needful that a felony should have actually been committed. *Thorne v. Turck*, 13 Week. Dig. 550.

The absence of probable cause must be averred and proved. *Hawley v. Butler*, 54 Barb. 490.

Where an arrest is made by a private person, probable cause or grounds for suspicion afford no justification unless a felony has been actually committed, and the burden of proving the commission of a felony is upon the defendant. *Burns v. Erbin*, 40 N. Y. 466.

Where a private person seeks to justify an arrest or aiding in the arrest of another without warrant, on a criminal charge, it must appear that a felony had been committed and that he acted circumspectly, and upon grounds which would have justified a careful and prudent person in believing that the person arrested was guilty of the crime. The burden is upon him to show that the circumstances justified the situation, and if this is made to appear, he is not liable, although the accused was in fact innocent. *Farnam v. Feeley*, 56 N. Y. 453, citing *Holley v. Mix*, 3 Wend. 354; *Brackett v. Eastman*, 17 Wend. 32; *Carl v. Ayres*, 53 N. Y. 14; Addison on Torts, 555.

**SUBDIVISION 2.****Lawful Authority and Justification.**

Where a warrant, under which an arrest was made, shows a case which comes within the jurisdiction of a justice issuing it, although it does not recite a legal offense, the officer is protected in acting under it, and it is error to refuse a nonsuit. *Smith v. Warden*, 4 Hun, 787.

A person has no right to arrest a mere trespasser who offers no violence, and is liable for false imprisonment for such an arrest. *Midford v. Kann*, 32 App. Div. 228, 52 N. Y. Supp. 995.

For cases where it was held that an assistant clerk of a police magistrate was justified in removing a person from the courtroom on his own responsibility, see *Hopner v. McGowan*, 116 N. Y. 405.

Where the defendant was sued for imprisoning the plaintiff under an attachment which had been set aside, it is sufficient to show that the order setting it aside was not legally made. *Lewis v. Penfield*, 39 How. Pr. 490.

Nor will false imprisonment lie where the process was irregular,

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if it is merely set aside upon other grounds. *Nebenzahl v. Townsend*, 61 How. Pr. 353.

An action can only be maintained where the arrest was unlawful and without authority of law, and if the complaint and affidavits show that the arrest was lawfully effected, a nonsuit should be granted. *Warren v. Dennett*, 13 Misc. Rep. 329, 34 N. Y. Supp. 462, 68 St. Rep. 366.

For a case where the defendant was held to be justified in causing plaintiff's arrest for failing to return a horse and wagon, hired of the defendant, see *Olmstead v. Dolen*, 25 St. Rep. 634, 6 N. Y. Supp. 130.

An arrest made upon a void warrant cannot be justified as an arrest for a different cause. *Murphy v. Kron*, 20 Abb. N. C. 259.

A criminal conviction of the plaintiff by a police justice having no jurisdiction is no evidence of his guilt, and thus is not a defense in an action for false imprisonment. *Kolzern v. Broadway, etc., Ry. Co.*, 1 Misc. Rep. 148, 48 St. Rep. 656, 20 N. Y. Supp. 700.

An action for false imprisonment was held not to lie where it appeared that the arrest had been made on the ground that the plaintiff obtained goods upon false pretenses as to his responsibility, and where it appeared that to obtain such goods the plaintiff had represented himself as controlling considerable amount of property, and yet within four months thereafter had failed for a large amount, owing bills contracted prior to the failure. *Moses v. Dickinson*, 2 City Ct. 184.

In an action for false imprisonment justification must be specifically alleged. *Brown v. Chadsey*, 39 Barb. 253.

**SUBDIVISION 3.****Consent of Plaintiff.**

In *Warren v. Dennett*, 17 Misc. Rep. 88, 39 N. Y. Supp. 830, it was held that where the plaintiff was arrested by the defendant for refusing to pay ten cents extra in a restaurant, but paid the same at the police station, that if it was a voluntary payment and a settlement of the difference, that then the plaintiff could not recover; but if it was brought about by fear, threat, coercion, and duress, then the defendants were liable, and where the evidence upon this point is complicated, it is a proper question for the jury.

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It is no defense to an action against the officers of a bank that a person was imprisoned by the locking of the doors at the usual time, although he knew the time at which the bank usually closed. *Woodward v. Washburn*, 3 Den. 369.

Where a person was arrested for hawking, in violation of a village ordinance, and though first pleading not guilty to the charge, paid the fine imposed, it was held that such plea, together with the payment of the fine, etc., effectually barred the action on his part for false imprisonment. *Jones v. Foster*, 43 App. Div. 33, 59 N. Y. Supp. 738, citing *Cuniff v. Beecher*, 84 Hun, 137, 32 N. Y. Supp. 1067; *Robbins v. Robbins*, 133 N. Y. 597; *Oppenheimer v. Manhattan Ry. Co.*, 45 St. Rep. 134, 18 N. Y. Supp. 411.

For defenses founded upon the theory that there was no compulsion, and that the plaintiff voluntarily submitted to the imprisonment, see cases cited under "Elements Necessary to False Imprisonment — Compulsion Necessary."

## SUBDIVISION 4.

## Arrest by Agent.

A recovery for false imprisonment obtained against a detective who verified an information prepared by the district attorney, embodying the results of his investigation, was reversed upon the ground that the application for such warrant was not really made by the detective, but by the district attorney, in his official capacity. *Whitney v. Hanse*, 36 App. Div. 420, 55 N. Y. Supp. 375.

A railroad company has been held not to be bound by the unauthorized arrest, in its station, of one not a passenger, which arrest was made by a railroad detective. Such arrest was not within the scope of his authority. *Penny v. N. Y. C. & H. R. R. Co.*, 34 App. Div. 10, 53 N. Y. Supp. 1043.

The question as to the liability of one partner for the false imprisonment, caused by another, is considered by the court in *Farrell v. Friedlander*, 63 Hun, 256, 18 N. Y. Supp. 215, where the court said that there is a line of cases which go to the length of holding the joint liability of partners, as stated in Abbott's Trial Brief, p. 217, as follows: "If the act itself was one within the scope of the business and done as such, then it is not material that the other partners were ignorant and innocent, nor that it was willful; otherwise if the act was wholly foreign to the business.

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If the act was presumptively a partnership act, because, though not in the line of the trade, it was incidental to the exercise of an implied power — as where a partner in collecting a debt due the firm directs an officer to make a tortious levy — then the act of one partner is presumptively that of all, and evidence that they, with knowledge of the facts, received the benefits of it, is conclusive against them.” The court says, however, that the principle underlying the liability of one partner for the tort of another is governed by the principles of law of agency, and like the liability of a master for the tortious act of his servant is confined within the limits of the implied authority with which each partner is invested by virtue of the partnership relation. \* \* \* “I can find, however, no case which goes to the extent of holding that the malicious prosecution of offenders has been admitted to be within the power constructively delegated to one partner as the agent of another.” See this case for a full discussion of the subject.

See *Mulligan v. N. Y. & R. B. Ry. Co.*, 129 N. Y. 506, reversing 39 St. Rep. 20, 14 N. Y. Supp. 456, where it was held that a railroad corporation was not liable for an arrest by its servant upon the ground that it was not shown that the servant was acting within the course of his employment at the time. *Earl and Finch, JJ.*, dissenting.

For a case where the defendant was held not to be liable for an arrest caused by its general superintendent, where a special agent was employed in that particular line of business, see *Lubliner v. Tiffany & Co.*, 54 App. Div. 326, 100 St. Rep. 659, 66 N. Y. Supp. 659.

Where a passenger had left the wharf of the defendant steamboat company and was followed by the purser, defendant's agent, and told to come into the waiting-room, where the purser locked the door and investigated the contents of a satchel,—*Held*, that the act of the purser was not within the scope of his authority, and no action for false imprisonment could lie against the defendant company. *McKay v. Hudson River Line*, 56 App. Div. 201, 67 N. Y. Supp. 651, 101 St. Rep. 651.

## SUBDIVISION 5.

## Defense of Person or Property.

One in peaceable possession of land is not liable for false imprisonment in causing the arrest of a person who interferes forcibly with such possession. *Coogan v. McArdle*, 1 Rob. C. C. 231.

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As a simple trespass is not a crime one is liable for false imprisonment, in having such a trespasser arrested. The defendant will be justified in using such force as is necessary to remove a trespasser, and if resistance is offered may increase such force. If violence is used against him while endeavoring to eject a trespasser, it would be an assault, for which the party would be liable to arrest. *Midford v. Kann*, 32 App. Div. 228, 52 N. Y. Supp. 995.

**SUBDIVISION 6.****Detention not Terminated.**

For defenses founded upon the fact that the criminal proceedings have not been terminated, see cases under title "Elements of the Wrong — Termination of Detention."

A person cannot maintain a civil action for false imprisonment where his arrest has been followed by a conviction in a criminal court, and while that conviction remains unreversed, unless he shows that his conviction was obtained by fraud or conspiracy, and that fraud or conspiracy must be one in which the court and the person whom he proceeds against participate. Judgment of conviction of a criminal court cannot be attacked collaterally by the person convicted. The person who believes himself to have been unjustly convicted must procure a reversal of such conviction before he can maintain a civil action. *Cuniff v. Beecher*, 84 Hun, 137, 66 St. Rep. 199, 32 N. Y. Supp. 1067, citing *Robbins v. Robbins*, 133 N. Y. 593; *Oppenheimer v. Manhattan El. Ry. Co.*, 18 N. Y. Supp. 411, 45 St. Rep. 134.

**SUBDIVISION 7.****As to Advice of Counsel.**

It is no defense to an action for false imprisonment that the defendant acted under advice of counsel. *Ackroyd v. Ackroyd*, 3 Daly, 38.

The advice of counsel is no defense unless it be shown that the same was given after a full and fair statement of the facts. *Davidsoof v. W. & W. Mfg. Co.*, 14 Misc. Rep. 456, 35 N. Y. Supp. 1019. Compare the same subject in "Malicious Prosecution."



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 Art. 11. Imprisonment of Various Classes of Persons.
 

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**ARTICLE XI.****IMPRISONMENT OF VARIOUS CLASSES OF PERSONS.**

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**SUBDIVISION 1.****Wives, Children, Servants.**

Where a husband had procured an absolute divorce from his wife, and where the decree awarded the custody of the children to him, and the wife subsequently obtained possession of one of the children, refusing to give him up, the husband was held liable for false imprisonment where he called a policeman and caused the arrest of the mother. The court says: "The defendant mistook his remedy. He should have taken the child by force, if the decree allowed him, in a gentle manner, but he could not arrest the plaintiff because she refused to voluntarily give up the child." *Monjo v. Monjo*, 53 Hun, 145, 6 N. Y. Supp. 132.

A master may maintain an action against one who imprisons his servant for loss of the services occasioned thereby. *Woodward v. Washburn*, 3 Den. 369.

**SUBDIVISION 2.****Insane and Dangerous Persons.**

By virtue of section 223 of the Penal Code force and violence used toward the person of an idiot, lunatic, insane person, etc., to prevent him from committing an act dangerous to himself or another, is not unlawful. But this section is more applicable to actions involving assault and battery, for by section 377 of the Penal Code, a person "who confines an idiot, lunatic, or insane person in any other manner or in any other place than is authorized by law \* \* \* is guilty of a misdemeanor." In regard to the commitment, care, and discharge of the insane, see *Insanity Law*, §§ 60-77.

Where the plaintiff alleges that defendant physicians falsely and maliciously signed a certificate whereby he was imprisoned as insane in a hospital, the gist of the action is false imprisonment. *Hurlehy v. Martin*, 31 St. Rep. 471, 10 N. Y. Supp. 91.

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Art. 11. Imprisonment of Various Classes of Persons.

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There is a presumption in favor of the validity of a warrant. Where a lunatic was arrested upon a warrant issued by two police justices of the city of Albany upon a complaint and certificate of two reputable physicians, it was held that every intendment was in favor of the jurisdiction of the magistrates, and from the fact that the warrant was issued in the city of Albany it was to be presumed that the lunatic was there at the time the warrant was issued, and that a mere statement of the warrant that the lunatic was at the town of Knox was merely a description of the person, and did not contradict the fact that he was in Albany when the warrant was issued.

Making a complaint that a person is a lunatic before a magistrate, who then authorized the arrest of the alleged lunatic as such, is not in itself sufficient ground for an action of false imprisonment. Nor is the additional fact that the complainant hands the warrant to an officer sufficient, and the officer executing such a warrant is not bound to look beyond the same, if it is regular upon its face. *Williams v. Williams*, 4 T. & C. 251, 2 Hun, 111.

A private person who, without judicial warrant or process, on his own motion, interferes with the liberty of an alleged lunatic, takes the responsibility of his error of judgment. But where restraint was demanded by necessity for the care and safety of the individual restrained, or for the protection of others, there is not actionable trespass. *Emmerich v. Thorley*, 35 App. Div. 452, 54 N. Y. Supp. 791, citing 2 Addison on Torts, 28; *Look v. Dean*, 108 Mass. 116; *Colby v. Jackson*, 12 N. H. 529; *Fletcher v. Fletcher*, 28 L. J. (Q. B.) 136.

Where a son-in-law procured the imprisonment of his father-in-law, upon the grounds of insanity on his own verified petition, and on a defective certificate of two physicians,—*Held*, that he was liable. That the petition and the certificate did not confer jurisdiction upon the county judge under section 2 of the Insanity Law, as under such section a son-in-law has no authority to make the application, and also because the certificate of the medical examiners did not show that the plaintiff was insane, as required by section 61. *Washer v. Slater*, 67 App. Div. 385, 73 N. Y. Supp. 425, 107 St. Rep. 425.

Where a judge before whom a proceeding is instituted for the commitment of a lunatic, under the statute, errs in his judgment as to whether the facts presented do or do not confer jurisdiction, he is not liable to an action for false imprisonment for committing

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 Art. 11. Imprisonment of Various Classes of Persons.
 

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such person as insane. But a physician signing a certificate in such proceeding to the effect that the person is insane is not in law acting as a judicial officer, but as a medical expert, and has not the judicial immunity. He is chargeable with neglect, which, in the case of a professional expert, would render him liable for failure to use the skill and care required in his profession. *Ayers v. Russell*, 50 Hun, 282, 3 N. Y. Supp. 338.

This case also construes the statute, chapter 446 of Laws of 1874, and holds that under such statute it is discretionary with the judge whether or not he shall call a jury to determine the question of lunacy.

For a case turning upon the right of a physician to confine a person supposed to have the small-pox, see *Ryder v. Fuller*, 13 Hun, 669. The General Term held, that under the evidence the court was not prepared to say that a verdict which charged the defendant with \$500 damages was against the weight of evidence. A new trial, however, was given, on the ground that there had been an error in the admission of evidence on the question of damages. The defendant did not plead justification, and thus was not permitted to show that he acted under authority, and thus was technically liable, but, as the court said, only for compensatory damages for the consequences of his own acts so long as the same were in good faith.

Although a commissioner of health of a city may be authorized by statute, in case of impending pestilence, to take such measures as he may, with the approval of the mayor and president of the medical society, declare the public health and safety require, and require the isolation of all persons and things infected or exposed to such disease — yet he is only authorized to quarantine an individual who has been exposed to the disease under conditions which would permit communication of the disease. The mere possibility that the individual might have been exposed to the disease is insufficient. *Smith v. Emery*, 11 App. Div. 10, 42 N. Y. Supp. 258.

### SUBDIVISION 3.

#### Witnesses and Persons Privileged from Arrest.

Exemption from arrest is a personal privilege, which may be waived, and it will be deemed to have been waived unless the party avail himself of the privilege at the first opportunity to assert it and obtain his liberty. *Dow v. Smith*, 7 Vt. 465; *Hess v. Morgan*, 3 Johns. Cas. 84.

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 Art. 11. Imprisonment of Various Classes of Persons.
 

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Section 860 of the Code of Civil Procedure exempts witnesses from arrest.

§ 860. *Witness exempt from arrest.*—A person duly and in good faith subpoenaed or ordered to attend, for the purpose of being examined, in a case where his attendance may lawfully be enforced by attachment, or by commitment, is privileged from arrest in a civil action or special proceeding, while going to, remaining at, and returning from, the place where he is required to attend.

By virtue of section 861 a person so arrested may be discharged.

§ 861. *When to be discharged from arrest.*—The court, from which a subpoena, served in good faith, was issued, or by which an order was made, requiring a person to attend, for the purpose of being examined; or a judge thereof, upon proof, by affidavit, of the facts, must make an order, directing the discharge of a witness or other person, from an arrest made in violation of the last section.

§ 862. *By whom witnesses may be discharged.*—A justice of the Supreme Court, in any part of the State, or a county judge, has the like authority as a judge of the court, to make an order for a discharge, in a case specified in the last section. Upon satisfactory proof, by affidavit, of the facts, he must also make an order, directing the discharge of a person arrested, in violation of section 860 of this act, where a subpoena, served in good faith upon the person arrested, was issued as prescribed in section 854 of this act.

§ 863. *Arrest, when void; penalty.*—An arrest, made contrary to the foregoing provisions of this title, is absolutely void, and is a contempt of the court, if any, from which the subpoena was issued, or by which the witness was directed to attend. An action may be maintained, by the person arrested, against the officer or other person making such arrest, in which the plaintiff is entitled to recover treble damages. A similar action may also be maintained, in a like case, by the party in whose behalf the witness was subpoenaed, or the order procured, to recover the damages sustained by him, in consequence of the arrest.

It will be noted that section 863 gives to the plaintiff so illegally arrested an action against the officer or other person making such arrest, and a similar action also lies on behalf of the party in whose behalf the witness was subpoenaed.

But by virtue of section 864 the sheriff or other officer or person is not so liable unless the person claiming the exemption makes an affidavit, if required, to the effect that he was illegally subpoenaed, etc.

§ 864. *Sheriff not to be liable unless affidavit is made.*—But a sheriff or other officer, or person, is not so liable, unless the person claiming an exemption from arrest, makes, if required by the sheriff

## Art. 12. Parties.

or officer, an affidavit, to the effect that he was legally subpoenaed or ordered to attend, and that he was not so subpoenaed or ordered by his own procurement, with the intent of avoiding arrest. In his affidavit, he must specify the court or officer, the place of attendance, and the cause in which he was so subpoenaed or ordered. The affidavit may be taken before the officer arresting him, and exonerates the officer from liability for not making the arrest.

In *Kreiser v. Scofield*, 10 Misc. Rep. 350, 63 St. Rep. 413, 31 N. Y. Supp. 23, reversing 9 Misc. Rep. 200, 60 St. Rep. 839, 29 N. Y. Supp. 685, it was held that at common law the arrest of a privileged person is voidable only and not void and does not constitute trespass, and is insufficient to support an action for false imprisonment. Sections 863, 864 of the Code, however, authorize such an action for such arrest and give treble damages.

In the *Kreiser Case* it seems to be held that the action was conducted as a common-law action, and that no reference was made to the statute; therefore the statute could not be invoked because there was no such rule at common law. It seems also that the statutory action lies only against the officer or person making the arrest, and even they are not liable unless the person arrested claims his exemption and makes an affidavit, if required. It follows, therefore, that the statutory action does not lie either against the plaintiff, who has procured the arrest in the action, or against the plaintiff's attorney. See this case also for circumstances under which the privilege terminates and expires.

For decisions turning upon the arrest of persons privileged under the old £10 Act, see *Percival v. Jones*, 2 Johns. Cas. 49; *Hess v. Morgan*, 3 Johns. Cas. 84.

## ARTICLE XII.

## PARTIES.

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## SUBDIVISION 1.

## Plaintiffs.

This action like other torts for a personal injury, being non-assignable, must be brought by the party imprisoned. But the

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wrong may be accompanied by loss to third persons standing in domestic or contractual relations to the person imprisoned. The injury in such case is, in the theory of law, an injury to property rights, and the action is not for the *personal* injury.

Thus, while an action for false imprisonment may be maintained against the putative father of an illegitimate child who retains its custody without right and against the consent of the child, the action can be brought only in the name of the child, whose rights were violated, and the recovery is for the benefit of the infant, and not for the benefit of the mother. If such parent sustain injury for the loss of services or medical attendance, the proper action is upon the case. The action for personal injury can only be brought in the name of the child. *Robling v. Armstrong*, 15 Barb. 248, citing *Reeves' Dom. Rel.* 291; *Whitney v. Hitchcock*, 4 Den. 461; *Cowden v. Wright*, 24 Wend. 429; *Bartley v. Richtmeyer*, 4 N. Y. 43.

The proper parties plaintiff in an action for injury done to a slave, servant, apprentice, or minor child, is well stated in the case of *Woodward v. Washburn*, 3 Den. 371: "It is a general principle that an action lies \* \* \* in favor of the party who stands in place of the parent, by reason of which he sustains a loss of service, or has been put to expense in sickness and providing medical aid. But for the direct personal injury the person upon whom it is inflicted is entitled alone to the action and to the damage then recovered. The master or parent's right to recover rests upon the ground that he has been deprived of some services to which he was entitled, or has been put to some expense." It was further held that the hiring of a person of full age for wages creates the relation of master and servant, and will enable the former to maintain an action on the case against one who imprisons such person, resulting in a loss of his services. See this case also for the distinction between servants and employees.

## SUBDIVISION 2.

## Party Instigating Imprisonment.

In trespass all who aid or assist are principals. Hence, one who directs the imprisonment of another is guilty of the imprisonment. So held in a case where the superintendent of police told an officer who made the arrest to take the prisoner back and lock him up. Such superintendent will not be permitted to show that

## Art. 12. Parties.

the act was not in consequence of his request, for he cannot direct a trespass, and after its commission escape, upon the ground that the officer violated his duty in obeying the direction. *Greene v. Kennedy*, 46 Barb. 16, affirmed 48 N. Y. 653.

A defendant, therefore, who directs an arrest and imprisonment is liable. In contemplation of law, he committed those acts; and no man is allowed to incite another to trespass, and after its commission, to give his want of influence in evidence in bar of the action. Such a principle will enable a man to encourage another to commit murder, in his presence, and then escape, upon the ground that the homicide was malicious enough to have done the same thing if he had remained silent. *Coates v. Darby*, 2 N. Y. 517, overruling *Herrick v. Manly*, 1 Cai. 553.

Where a party is arrested under a warrant issued without jurisdiction, the persons instrumental in procuring it to be issued are liable to an action for false imprisonment. *Lansing v. Case*, 4 N. Y. Leg. Obs. 221, 8 Law Rep. 451.

One who directs a police officer to arrest another where the same is not justified is responsible for such arrest. *Dodge v. Alger*, 21 J. & S. 107. See also *Wynn v. Hobson*, 22 J. & S. 330.

Even if the plaintiff is not arrested on the distinct order of the defendant, yet, if he subsequently ratify the act of the officer making the arrest, he is liable. *Callahan v. Searles*, 78 Hun, 238, 60 St. Rep. 214, 28 N. Y. Supp. 904.

See authorities cited under previous articles.

## SUBDIVISION 3.

## Joinder of Defendants.

In trespass, all who aid or assist are principals. *Greene v. Kennedy*, 46 Barb. 16, affirmed without opinion 48 N. Y. 653; *Coates v. Darby*, 2 N. Y. 519.

All persons who accomplish, procure, aid, or assist in an unlawful detention are liable as principals. Liability may also attach by ratification, or by virtue of relationship of parties. Hale on Torts, 246.

Where a private individual directs an officer to arrest the plaintiff for breach of peace committed before the officer's arrival, which is done without a warrant and is illegal, both the private person and the officer are joint tortfeasors. *Wynn v. Hobson*, 22 J. & S. 330.

## Art. 13. Pleading.

As to the liability of officer issuing process without jurisdiction, together with the liability of the party at whose instance the process was issued, see *Vredenburg v. Hendricks*, 17 Barb. 183, cited *Merritt v. Reed*, 5 Den. 352. See *Vosburgh v. Welch*, 11 Johns, 175; *Miller v. Brinkerhoff*, 4 Den. 116.

In *Holley v. Mix*, 3 Wend. 351, it was said that this action is several as well as joint; that there can be but one assessment of damages; that, if an action be brought against two defendants, the plaintiff may elect to take his damages against either of them. If several damages are awarded by the jury, the plaintiff may cure the irregularity by entering a *nolle prosequi* against all but one, and take judgment against him alone.

For a case where it was held that the complaint should be dismissed as against one defendant, on the ground that there was no evidence to sustain the charge against him, see *Carson v. Dessau*, 36 St. Rep. 425, 13 N. Y. Supp. 232.

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## PLEADING.

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## SUBDIVISION 1.

## Complaint.

Where an action is based upon the fact that the plaintiff was arrested in Saratoga county by defendant, a deputy sheriff of Warren county, and was taken to and imprisoned in Warren county, an action may properly be brought in Saratoga county, as part of the cause of action arose there. *Ellis v. Baker*, 62 App. Div. 542, 71 N. Y. Supp. 88, 105 St. Rep. 88.

It seems that causes of action of false imprisonment and malicious prosecution may be united in the same complaint. "They are consistent with each other, and the one is not destructive of the other, and it has been the common practice to unite them." *Marks v. Townsend*, 97 N. Y. 597, citing *Doyle v. Russell*, 30 Barb. 300; *Burr v. Shaw*, 10 Hun, 580; *Dusenbury v. Keiley*, 85 N. Y. 389; *Carl v. Eyres*, 53 N. Y. 14; *Bradner v. Falkner*, 93 N. Y. 515.



## Art. 13. Pleading.

Causes of action for false imprisonment and malicious prosecution may be united in the same complaint, and are consistent with each other; but both actions cannot be maintained upon the same state of facts. *Warren v. Dennett*, 17 Misc. Rep. 87, 39 N. Y. Supp. 830, citing *Marks v. Townsend*, 97 N. Y. 594; *Cunningham v. East River El. Co.*, 17 N. Y. Supp. 372; *Ackroyd v. Ackroyd*, 3 Daly, 38. See *Warren v. Dennett*, *supra*, for complaint which was held to state action for false imprisonment.

There is a *dictum* to the effect that a cause of action for false imprisonment and malicious prosecution cannot be alleged in different counts in the same complaint, in *Nebenzahl v. Townsend*, 61 How. Pr. 353, 12 Week. Dig. 511.

The actions for false imprisonment and malicious prosecution may be united in one complaint, and the plaintiff cannot be compelled to elect between them. The court says that the early cases hold that the two cases are essentially distinct, and cannot be united in one complaint, but that the rule appears to have been changed. *Thorpe v. Carvalho*, 14 Misc. Rep. 557, 36 N. Y. Supp. 1, citing Code, § 484, subd. 2; *Marks v. Townsend*, 97 N. Y. 594; *Cunningham v. East River El. Co.*, 42 St. Rep. 212; *Neill v. Thorne*, 88 N. Y. 270.

Where the complaint in a single count contains allegations which might be treated, either as for false imprisonment or for malicious prosecution,—*Held*, that a judgment should not be sustained unless the proof established both causes of action. So held in a case where the defendant failed to demur, and was not entitled to compel election at commencement of the trial, and where it was assumed from the record that both causes of action were submitted to the jury. *Tyson v. Bauland Co.*, 68 App. Div. 310, 74 N. Y. Supp. 59, 108 St. Rep. 59.

A cause of action for slander and one for false imprisonment may be united in the same complaint, under section 487 of the Code. *Held*, also, that, on a motion to amend the complaint in the action for slander, the plaintiff should be allowed to add a count for false imprisonment. *De Wolfe v. Abram*, 6 App. Div. 172, 39 N. Y. Supp. 1029, reversed 151 N. Y. 186.

Where the plaintiff joined actions for false imprisonment and malicious prosecution, and the court refused to dismiss the complaint as to the latter, and the jury found for the defendant

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Art. 13. Pleading.

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thereon, it was held that it was so distinct from the other cause of action that the jury was not prejudiced by the ruling. *Thorne v. Turck*, 18 Week. Dig. 550.

A complaint, in an action for false imprisonment, is defective which does not allege either that the imprisonment of the plaintiff was illegal or was procured without a warrant.

A complaint which states that the plaintiff was arrested, that the arrest was caused by the defendant, and that, upon the trial, there was no sufficient cause to believe him guilty, and that he was discharged, does not show that the defendant may not have been arrested upon a warrant which was duly issued.

In an action for malicious prosecution, the plaintiff must allege and prove that there was no probable cause for the prosecution, and that it was instituted through malice, and a mere allegation that the defendant maliciously charged the plaintiff with crime, does not relieve the latter from alleging a want of probable cause; an allegation that the charge was false, and that the plaintiff was acquitted, is not enough. *Cousins v. Swords*, 14 App. Div. 338, 43 N. Y. Supp. 907, affirmed on opinion below 162 N. Y. 625.

A complaint which, among other things, alleges that the defendant deprived the plaintiff of her liberty for an hour "without reasonable cause, and without any right or authority so to do," is not demurrable, as not stating a cause of action. It sufficiently alleges that the imprisonment was illegal. *Bonnett v. Wanamaker*, 34 Misc. Rep. 591, 70 N. Y. Supp. 372, 104 St. Rep. 372.

An allegation that the defendant entered the plaintiff's house and arrested her, and another allegation that they forcibly removed her therefrom and took her to jail, constitutes merely one cause of action. But an allegation of a conspiracy of two defendants to imprison the plaintiff, and that, in pursuance thereof, two other defendants were employed to make the arrest, is not irrelevant. It is not irrelevant to allege, in addition to a general averment of personal injury, that the plaintiff was prevented from performing certain domestic duties. *Exner v. Exner*, 2 Abb. N. C. 108.

For the same principle, see *Eyres v. Humphrey*, 1 E. D. Smith, 196; *Bebinger v. Sweet*, 1 Abb. N. C. 263; *Holton v. Jones*, 7 Robt. 164-249.

The fact that the plaintiff, among other things, states that the arrest was made "maliciously" does not change the action from

## Art. 13. Pleading.

false imprisonment to malicious prosecution, in a case where false imprisonment is clearly the gravamen of the action. *Rosecrans v. Hast*, 1 Misc. Rep. 220, 49 St. Rep. 222, 20 N. Y. Supp. 880.

Where an arrest was made without lawful process, the gist of the offense is unlawful imprisonment, and averments of malice and want of probable cause may be treated as surplusage, or as matter in aggravation of damages. *Ackroyd v. Ackroyd*, 3 Daly, 38.

The complaint must show that the arrest was illegal; an allegation that it was maliciously prosecuted is insufficient. *Cunningham v. East River El. Co.*, 17 N. Y. Supp. 372, 42 St. Rep. 212. In this case the court distinguishes false imprisonment from malicious prosecution, saying: "Allegation of malice does not help the plaintiff, for, even if the defendant were moved by malice in causing the arrest, unless the process was irregular and unlawful, an action for false imprisonment, as distinguished from one for malicious prosecution, would not lie."

This case reiterates the rule as to the distinction between false imprisonment and malicious prosecution, and the consequent necessity for recognizing that fact in framing the complaint, pointing out the difference in the material allegations, enforcing the proposition that the action for false imprisonment cannot be maintained where the process was regular and the arrest lawful, citing numerous authorities, including *Marks v. Townsend*, 97 N. Y. 596; *Von Latham v. Libby*, 38 Barb. 339; *Brown v. Chadsey*, 39 Barb. 253; *Landt v. Hilts*, 19 Barb. 283.

The absence of probable cause is an important one, and from time immemorial the absence of probable cause has always been a necessary allegation. *Hawley v. Butler*, 54 Barb. 490.

Where, in an action for false imprisonment, the plaintiff has alleged that he has been refused employment and suffered damage by loss of a contract, it was held, on a motion to make the complaint more definite and certain, that the plaintiff must set forth the names of the persons refusing him employment, and also the nature and character of the contract. *Lang v. Witte*, 2 Month. L. Bull. 22.

It is said that the particular instrumentality by which the plaintiff was deprived of his liberty must not be set out in the complaint for false imprisonment, and if such circumstances are set forth

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they should be stricken out upon motion. *Eddy v. Beach*, 7 Abb. Pr. 17. See also *Shaw v. Jayne*, 4 How. Pr. 119.

Special damage to an attorney's business, caused by his arrest, must be specially pleaded. *Evans v. Metropolitan St. Ry. Co.*, 47 App. Div. 511, 96 St. Rep. 495, 62 N. Y. Supp. 495.

The costs and counsel fees in defending a prosecution is a matter of special damages, which must be specifically alleged. *Thompson v. Lumley*, 7 Daly, 74.

Proof of the expense of getting an attorney to procure discharge of an illegal arrest cannot be shown unless pleaded. *Strange v. Whitehe*, 12 Wend. 64.

## SUBDIVISION 2.

## Answer.

In an answer to a complaint which alleged malice and lack of probable cause, the defendant should not set forth the facts and incidents which he expects to prove as showing probable cause, and such allegation will be stricken out upon motion. It seems that he should merely deny the plaintiff's allegations that there was probable cause. *Rader v. Ruckgaber*, 3 Duer, 604.

Justification must always be specifically pleaded, and, therefore, under the pleading of "not guilty," one who has had another arrested on a judgment and execution cannot show such judgment and execution as justification, even though evidence is not offered in justification or for the purpose of showing that the defendant is not guilty of trespass. *Coates v. Darby*, 2 N. Y. 519.

Justification, upon the ground that the defendant had reason to suspect that a criminal offense had been committed by the defendant, must be specifically pleaded, and the answer must first show actual commission of an offense, and then the cause to suspect the plaintiff of its commission. But, if less than this is pleaded, or if the evidence comes short of this, it can only go to the question of damages. *Brown v. Chadsey*, 39 Barb. 253.

As to allegations in an answer, which were held to constitute a complete justification for the arrest, see *Parke v. Gilligan*, 14 Misc. Rep. 121, 35 N. Y. Supp. 477, 70 St. Rep. 174.

Justification must be pleaded. A mere denial of knowledge or information, sufficient to form a belief as to whether the defendant caused the arrest, raises no issue. *Wilson v. Manhattan El.*

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*Ry. Co.*, 2 Misc. Rep. 127, 49 St. Rep. 116, 20 N. Y. Supp. 852, affirmed on opinion below 144 N. Y. 632, citing *Lawrence v. Derby*, 15 Abb. 346, note; *Brown v. Chadsey*, 29 Barb. 253.

It was held that the defendants cannot deny knowledge or information as to an allegation of the complaint, charging them with issuing the writ on which the plaintiff was arrested, and such answer to a verified complaint will be stricken out, on motion, without any additional affidavit in support of the motion. *Lawrence v. Derby*, 15 Abb. Pr. 346, note, 24 How. Pr. 133.

A cause of action on contract cannot be set up as a counterclaim in an action for false imprisonment. So held where defendant set up as such counterclaim a judgment recovered against the plaintiff in an action in which he was arrested. *Ferris v. Armstrong Co.*, 32 St. Rep. 908, 10 N. Y. Supp. 750, citing *People v. Denison*, 84 N. Y. 272.

In an action for false imprisonment, upon an execution against the person for costs, the fact that the plaintiff had, by an order of restitution, obtained repayment of the money paid to the sheriff to satisfy the execution, may be pleaded in mitigation, and is not a privileged defense. *Catlin v. Adirondack Co.*, 12 Week. Dig. 4.

Where the officers of a religious corporation, such as vestrymen, were sued for false imprisonment, in the removal of disturbers of a church meeting, it was held that it was not irrelevant for them to allege in the answer that they were such officers, acting as such in the transaction complained of. But allegations in such answer that the plaintiff, who was charged with the disturbance, expressed an intention to make it, and had at previous times made similar disturbances, was irrelevant, and should be stricken out. *Beckett v. Lawrence*, 7 Abb. Pr. (N. S.) 403.

Under the common-law pleading, where the duty of defendant as State attorney required him to sue by warrant for penalties for violation of city ordinance,—*Held*, that, in justifying in an action for false imprisonment, he need not aver that the plaintiff had in fact violated the ordinance. *Walker v. Cruikshank*, 2 Hill, 296.

## SUBDIVISION 3.

## Demurrer.

An allegation that the defendant is a corporation constitutes no part of the cause of action. Therefore, such complaint is not demurrable on the ground that it does not state facts constituting a

## Art. 13. Pleading.

cause of action. *Adams v. Lamson Store Service Co.*, 59 Hun, 127, 35 St. Rep. 518, 13 N. Y. Supp. 118.

For a case where the complaint was held to be demurrable on the ground that it did not set forth a proper cause of action against a judicial officer, see *Lange v. Benedict*, 73 N. Y. 12. It was there held "that the general averment in the complaint, that defendant 'wrongfully and willfully, without \* \* \* jurisdiction, falsely imprisoned' the plaintiff, did not entitle plaintiff to judgment under the rule that the demurrer admits the allegations in the pleadings demurred to, as, by the complaint, it was based upon the special circumstances set forth, and was no broader or more effectual than those circumstances."

Allegation in the answer in an action for unlawful arrest and false imprisonment, that defendant peaceably entered plaintiff's premises for the purpose of making an arrest for violation of the Excise Law, which he had reason to believe was being committed; that he was assaulted by plaintiff without just cause, and thereupon arrested him, and that such arrest and the subsequent charges made by him were made in good faith and with reasonable and probable cause, and were made for the sole purpose of preserving the public peace and in conformity to law,—*Held*, on demurrer, to constitute a complete justification for defendant's acts. *Park v. Gilligan*, 14 Misc. Rep. 121, 35 N. Y. Supp. 477.

A complaint is demurrable where it fails to allege detention and damage. *Pease v. Freiwald*, 39 Misc. Rep. 549, affirming 38 Misc. Rep. 805.

## FORMS.

## COMPLAINTS.

## Imprisonment by Defendant as Complainant.

## SUPREME COURT — ERIE COUNTY.

WILLIAM L. SAVAGE, Plaintiff,

agst.

WILLIAM McMILLAN, Defendant.

} Complaint, 37 App. Div. 103.

The plaintiff in this action, by William L. Jones, his attorney, complains of the defendant, William McMillan, and alleges:

## Art. 13. Pleading.

*First.* That on the 19th day of November, 1895, at the city of Buffalo, N. Y., the defendant contriving and maliciously intending to injure the plaintiff without any warrant or pretense of legal process, caused his arrest; and by force compelled the plaintiff to leave his business, and go to the police court in said city, two miles away, and there imprisoned this plaintiff, and then and there detained him, restrained of his liberty for the space of a number of hours, without reasonable cause and without any right or authority so to do, and against the will of the plaintiff, and then and there caused a false charge to be made against the plaintiff, that he had been guilty of felony, without reasonable cause, and without any right or authority so to do, and against the said will of the plaintiff, as aforesaid, whereby the plaintiff was held under arrest and imprisonment, and was injured in his credit and name, and prevented from attending to his necessary affairs and business during that time, and was compelled to procure bail and to expend \$25 in costs and counsel fee, and was held, imprisoned, until he was afterward, and on November 29, 1895, brought and compelled to appear before said police court, and the defendant then and there again falsely charged said plaintiff with the same offense, but the said court dismissed the said charge from custody, and the said plaintiff suffered damages on account of such malicious arrest, false charge, and imprisonment, as aforesaid, in the sum of \$5,000.

WHEREFORE said plaintiff demands judgment in this action for the sum of \$5,000 damages, aforesaid, and interest thereon from November 19, 1895, and the costs of this action.

WILLIAM L. JONES,  
*Plaintiff's Attorney.*

(Verified by plaintiff, February 10, 1896.)

### Arrest by Police Officers Without Warrant.

#### SUPREME COURT OF CITY OF NEW YORK.

HARRY V. SNEAD, Plaintiff,

*agst.*

MAURICE BONNOIL and JOHN COT-  
TRELL, Defendants.

} Complaint, 166 N. Y. 325.

The above-named plaintiff complains against the above-named defendants, as follows:

That on or about the 8th day of November, 1893, at the city of New York, the defendants maliciously, and with intent to injure

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the plaintiff, by force compelled plaintiff to go with them to the central police offices, and there imprisoned this plaintiff, and then and there detained him, restrained of his liberty, for the space of forty-eight hours, or thereabouts, without reasonable cause, and without any right or authority so to do, and against the will of the plaintiff, whereby the plaintiff was not only bruised and wounded, but was also injured in his credit, and was prevented from attending to his necessary affairs in business during that time, to his damage \$25,000.

WHEREFORE plaintiff demands judgment against the defendants for the sum of \$25,000, besides the costs and disbursements of this action.

GEORGE M. CURTIS,  
*Plaintiff's Attorney.*

**Complaint for Imprisonment by Agent on Charge of Shoplifting.**  
**SUPREME COURT — NEW YORK COUNTY.**

LOUISE VERGENNES STEVENS, Plaintiff,

*agst.*

HUGH O'NEILL, Defendant.

Complaint, 51 App. Div. 108,  
169 N. Y. 875.

The complaint of the plaintiff by Hawes & Norman, her attorneys, respectfully shows to the court, as follows:

*First.* That the plaintiff is a resident of the city, county, and State of New York, and the defendant is engaged in business in said city of New York, trading under the name and style of "H. O'Neill & Co."

*Second.* That on the 15th day of December, 1897, plaintiff was lawfully in defendant's store, at the corner of Twentieth street and Sixth avenue, in said city of New York, for the purpose of purchasing one of certain articles of merchandise, to wit: enameled watches, sold by defendant, and while examining same prior to purchase, she was with force and arms, forcibly and violently seized, assaulted, and laid hold of by the superintendent and the private detective of said defendant, all of whom were the servants and agents of defendant, employed as such by him, and acting under such employment and within the scope of their authority, who, at the same time and place, falsely, publicly, wickedly, and maliciously accused the plaintiff of having stolen from the defendant one of said enameled watches.

*Third.* That plaintiff did not steal said watch, or any other matter



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or thing from the defendant, and she then and there stated and demanded to be released. That said superintendent and said private detective, as such agents and servants of the defendant, and acting in the performance of such employment, and within the scope of their authority, refused to release plaintiff, but on the contrary, then and there said servants and agents of defendant, in the performance of such employment, and acting within the scope of their authority, and without any probable cause therefor, arrested plaintiff and threatened her with prosecution for the alleged theft of said watch from defendant.

*Fourth.* That thereupon the said superintendent and private detective of defendant, as such servants and agents of defendant, as aforesaid, in the course of their employment and acting within the scope of their authority, and with the knowledge and consent of the defendant, again with force and arms, forcibly and violently seized, assaulted, and laid hold of plaintiff, and against her will and consent placed her under arrest, and falsely and maliciously detained and imprisoned the plaintiff and compelled her to submit to a search or examination of her clothing and person at the hands of said private detective in the said store of defendant, for the alleged purpose of discovering property claimed to have been stolen from defendant, without any reasonable or probable cause and contrary to the laws of this State.

*Fifth.* That by reason of the said assault and the said false and malicious arrest, detention, and imprisonment of the plaintiff, as aforesaid, the plaintiff was subjected to great indignities, humiliation, and disgrace in being so detained and imprisoned, and was compelled to walk the entire length of defendant's store surrounded by a large crowd of Christmas shoppers and customers who were made aware that the plaintiff had been arrested charged with being a thief.

That by reason of such exposure, arrest, detention, imprisonment, and search of the plaintiff by the said servants and agents of the defendant acting within the scope of the knowledge and consent of the defendant, the plaintiff was greatly injured in her credit and circumstances and was then and there hindered and prevented from performing and transacting her necessary affairs and business and was caused to suffer much pain in both mind and body, for all of which she has sustained damage to the amount of \$25,000.

WHEREFORE plaintiff demands judgment against the defendant for the sum of \$25,000, together with the costs and disbursements of this action.

HAWES & NORMAN,  
*Attorneys for Plaintiff.*

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**Complaint Against Railroad for Imprisonment by Agent on Charge of Counterfeiting.****SUPREME COURT — KINGS COUNTY.**

AMANDA PALMERI, Plaintiff,

*agst.*MANHATTAN RAILWAY COMPANY,  
Defendant.

Complaint, 133 N. Y. 261.

The complaint of plaintiff respectfully shows to the court:

*First.* That the defendant is a corporation organized under and by virtue of the laws of the State of New York, and as such corporation was at the time hereinafter mentioned the owners of a certain elevated railroad known as the "Manhattan Railway Company," together with the tracks, cars, elevated structure, locomotives, and appurtenances thereto belonging, operated through and along Third avenue in the city of New York.

*Second.* That on the 1st day of February, 1889, plaintiff entered a station, known as the Forty-seventh street station, of defendant, said station being a regular stopping place for the defendant's cars, and paid her fare to a servant or agent in charge of said station aforesaid, and after plaintiff paid her said fare she was and became a passenger of defendant for hire, and said servant in hearing and presence of divers persons, and in a loud and tumultuous tone, spoke of and concerning the plaintiff the false and defamatory words, "you" (meaning plaintiff) "gave me a counterfeit twenty-five cent piece; I know you" (meaning plaintiff), "and know who you" (meaning plaintiff) "are." "You" (meaning plaintiff) "took up the wrong man, you" (meaning plaintiff) "can't pass any quids or counterfeit money on me, and I shall have you" (meaning plaintiff) "searched and arrested for trying to pass counterfeit money," and said defendant unlawfully and illegally restrained and detained plaintiff and imprisoned her, and prohibited her from proceeding to her destination, and refused to allow plaintiff to take passage on their cars after she had paid her fare as aforesaid.

Whereby and by reason of said slanderous and malicious words so spoken concerning plaintiff, and her unlawful arrest and detention, plaintiff suffered a severe shock, and her nerves were and become unstrung, and plaintiff became ill by reason thereof, and she was confined to her bed for two weeks, and she suffered disgrace and mortification, and her reputation and name was injured, to her damage \$5,000.

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WHEREFORE plaintiff demands judgment against the defendant for the sum of \$5,000 damages, besides costs of this action.

BALDWIN F. STRAUSS,  
*Attorney for Plaintiff, etc.*

NOTE.—For a complaint joining false imprisonment with malicious prosecution, see forms under “Malicious Prosecution.”

## ANSWERS.

## Specific Denials, with Plea of Justification.

## SUPREME COURT — ERIE COUNTY.

WILLIAM L. SAVAGE, Plaintiff,

*agst.*

WILLIAM McMILLAN, Defendant.

Answer, 37 App. Div. 103.

The above-named defendant, William McMillan, by Charles L. Feldman, his attorney, for his answer to the plaintiff's complaint:

Denies that the defendant on the 19th day of November, or at any other time, at the city of Buffalo, or elsewhere, contrived or intended, maliciously or otherwise, to injure the plaintiff or cause his arrest without pretense of legal process.

Denies that defendant restrained plaintiff of his liberty or arrested or imprisoned him or made a charge against him without reasonable cause or authority so to do.

Denies that defendant caused a false charge to be made against the plaintiff at any time.

Denies that plaintiff was held imprisoned from the 19th day of November, 1895, until November 29, 1895.

Denies any knowledge or information sufficient to form a belief as to each and every allegation of the complaint not hereinbefore specifically denied.

And for a second, separate, and further defense this defendant alleges that all of the time hereinafter mentioned this defendant was the superintendent of parks of the city of Buffalo; that the said city of Buffalo was and is a domestic municipal corporation, and that as such superintendent defendant had charge and custody and possession of the property hereinafter mentioned.

That the defendant, prior to November 19, 1895, as such superintendent, had piled up a large quantity of stone in Masten place, which was then and there a public ground of the said city of Buffalo, which said stone, as defendant was then and there informed and be-

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lieved, and as defendant now alleges upon information and belief, was then and there the property of the said city of Buffalo, and said stone was then and there in the actual custody, control, and possession of this defendant.

And defendant further alleges, upon information and belief, that thereafter the plaintiff, without the knowledge or consent of the city of Buffalo, or of this defendant, before daylight, and in the early morning hours of the said 19th day of November, 1895, secretly removed about 1,500 feet of said stone, of the value of \$300 and upwards, from the said place where it was piled up to an adjoining lot, and from there said plaintiff caused large quantities of said stone of the value of more than \$25 to be transported to some other place or places to this defendant unknown, and was about thereafter in defendant's presence to send away other quantities thereof when he was arrested as hereinafter alleged.

That thereupon the defendant believed that the crime of grand larceny had been committed in removing and transporting said stone from the custody and possession of defendant as aforesaid, and the defendant had reasonable cause to suspect the plaintiff of having committed such crime, and thereupon caused the plaintiff to be arrested and arraigned before Hon. Thomas S. King, who was then and there police justice of the city of Buffalo, to be dealt with according to law.

That all of said acts were done by this defendant in good faith without any malice against the plaintiff or intention to injure him, but solely in the discharge of defendant's duty as he understood it.

That the above acts are the same of which the plaintiff complains.

WHEREFORE the defendant demands judgment dismissing the complaint, with costs.

CHARLES L. FELDMAN,  
*Defendant's Attorney.*

**Answer with Denials and Plea in Mitigation of Damages.**

**SUPREME COURT — KINGS COUNTY.**

AMANDA PALMERI, Plaintiff,

*agst.*

MANHATTAN RAILWAY COMPANY,  
Defendant.

} Answer, 133 N. Y. 261.

The defendant, by Davies & Rapallo, its attorneys, answering the complaint herein:

*First.* Admits that it is a domestic corporation.

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*Second.* Denies any knowledge or information sufficient to form a belief as to each and every other allegation in the complaint made and contained.

*Third.* For a further and separate answer and defense in mitigation of any damages to which plaintiff might otherwise seem entitled, the defendant avers that at about the time mentioned in the complaint the plaintiff offered to defendant's agent in payment of her fare a counterfeit twenty-five-cent piece and was told by said agent that the same was not good. Whereupon the plaintiff addressed very improper and abusive language to the defendant's said agent and went her way.

WHEREFORE defendant demands that the complaint may be dismissed, with costs.

DAVIES & RAPALLO,  
*Attorneys for Defendant.*

(Verified by secretary, April 2, 1889.)

## ARTICLE XIV.

## EVIDENCE.

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## SUBDIVISION 1.

## Of Malice.

Where punitive damages are claimed, all facts tending to show that the defendant acted maliciously are admissible, and, on the other hand, all facts tending to show that he acted in an honest belief that he was justified may be shown. *Voltz v. Blackmar*, 64 N. Y. 440, reversing 4 Hun, 140.

The defendant in an action for false imprisonment is entitled to show that he acted with good faith and without malice, and it is error to exclude testimony tending to show these facts. *Warren v. Dennett*, 17 Misc. Rep. 88, 39 N. Y. Supp. 830.

It is competent for the defendant, in an action for false im-

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prisonment, to testify that he acted in good faith, and was actuated by no ill-will toward the plaintiff, and believed the truth of the charges made. *Rosen v. Stein*, 54 Hun, 179, 26 St. Rep. 881, 7 N. Y. Supp. 368, citing *McCowan v. Hunter*, 30 N. Y. 625; *Farnham v. Feeley*, 56 N. Y. 451.

The question of the presence or absence of malice is ordinarily a question for the jury. See *Rosen v. Stein*, 54 Hun, 179, 26 St. Rep. 881, 7 N. Y. Supp. 368, for a case where it was held that, under the circumstances, the question of malice was for the jury, and that the court could not decide, as a matter of law, that the evidence did not sustain the finding. Where a jury finds want of probable cause, they may, from the same facts, infer malice. "Not that the want of probable cause raises any presumption of law of the existence of malice, but establishes a feature or element in the case from which malice may be inferred and found as a fact by the jury." Citing *McCormick v. Perry*, 47 Hun, 74.

In an action for false imprisonment, the defendant may allege in mitigation facts tending to show that he acted without malice, and that there was reasonable cause for his action. Under section 536 of the Code, the defendant may prove on the trial facts not amounting to a total defense, but which may mitigate the damage set forth in the answer. *Bradner v. Faulkner*, 93 N. Y. 515, reversing 16 Week. Dig. 240.

Where the defendant procured the plaintiff's arrest without probable cause, and with a view to enforcing a civil remedy, it is proper for the court to charge that if the jury find that there was no probable cause they might infer from that fact alone that the arrest was made through malice. *Rosen v. Stein*, 54 Hun, 179, 26 St. Rep. 881, 7 N. Y. Supp. 368, distinguishing *McCormick v. Perry*, 47 Hun, 74.

## SUBDIVISION 2.

## Of Probable Cause.

Where an arrest is made without warrant the plaintiff must prove want of probable cause, and where evidence of discharge by a police justice is given it is *prima facie* evidence of want of probable cause, and throws upon defendant the burden of proving the contrary. *Rosenkranz v. Hass*, 1 Misc. Rep. 220, 49 St. Rep. 222, 20 N. Y. Supp. 880.

Though evidence of probable cause cannot be given unless such

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justification is pleaded, yet evidence showing grounds for suspecting the plaintiff of the crime is admissible upon the question of damages. Upon that point it is material as tending to relieve the defendant from the imputation of having acted from improper motives. *Brown v. Chadsey*, 39 Barb. 253.

Where an action was brought against a railroad company for causing plaintiff's arrest on a charge that he was making a disturbance in a car, evidence of the officer who made the arrest, and of other passengers, expressing approval of it, is competent to disprove plaintiff's testimony that he was making no disturbance. *Maguire v. Broadway & Seventh Ave. Ry. Co.*, 42 St. Rep. 824, 16 N. Y. Supp. 922.

In an action for false imprisonment on charge of larceny, evidence that the plaintiff's brother, who was arrested at the same time, was very sick, is admissible to show want of reasonable grounds for believing them guilty of the crime charged. *Fitzpatrick v. N. Y. & M. B. Ry. Co.*, 24 St. Rep. 636, 5 N. Y. Supp. 685.

Where there is no conflict of evidence as to the circumstances of imprisonment, the question of probable cause is one of law and not of fact for the jury. *Burns v. Erbin*, 40 N. Y. 463.

The burden of proof in this action is upon the plaintiff, and to recover he must show a fair preponderance of evidence that he was arrested at the instigation or procurement of the defendant and without probable cause. *Limbeck v. Gerry*, 15 Misc. Rep. 663, 39 N. Y. Supp. 95.

For a case in which it was held that the question of probable cause for the arrest of the plaintiff on the charge of adulterating milk should have been submitted to the jury, see *Perry v. Sutley*, 45 St. Rep. 61, 18 N. Y. Supp. 633.

**SUBDIVISION 3.****Of Legal Authority.**

The warrant under which plaintiff is arrested is admissible in evidence on behalf of the defendant. *Williams v. Williams*, 4 T. & C. 251, 2 Hun, 111.

In a warrant issued under an act to suppress immorality it is not necessary to state the circumstances which give the magistrate jurisdiction. Such facts may be shown *aliunde* in an action for false imprisonment. *Atchinson v. Spencer*, 9 Wend. 62.

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Where the defendant is a corporation, and the question of the agency of the person making the arrest is under consideration, evidence that the place where the arrest was made is under the defendant's control, is admissible. *Fitzpatrick v. N. Y. & M. B. Ry. Co.*, 24 St. Rep. 636, 5 N. Y. Supp. 685.

If the defendant has not pleaded justification he will not be permitted to show that he acted under authority. *Rider v. Fuller*, 13 Hun, 669.

**SUBDIVISION 4.****Of Intention.**

In an action for false imprisonment it is error to exclude testimony showing that the defendant acted in good faith. *Warren v. Dennett*, 17 Misc. Rep. 36, 39 N. Y. Supp. 830.

Where the defense was that the plaintiff had committed the crime of intimidating an officer, it was held that the question of the plaintiff's intent under the facts should have been submitted to the jury. *Smith v. Botens*, 36 St. Rep. 53, 13 N. Y. Supp. 222.

Where the plaintiff was arrested for riding a bicycle upon the sidewalk in violation of an ordinance, which act constituted a misdemeanor, it was held that evidence tending to show that the plaintiff rode upon the sidewalk in order to avoid approaching teams was improper. The plaintiff's motives were immaterial. *Fuller v. Redden*, 13 App. Div. 61, 43 N. Y. Supp. 96.

In an action for assault and battery and false imprisonment against a police officer, who arrested the plaintiff on information that he was killing his mother-in-law, evidence that on his way to the station-house the plaintiff threatened that he would murder the defendant or any one else who attempted to arrest him, was held to be admissible as bearing upon the question of the propriety of the force used by defendant. *Fulton v. Staats*, 41 N. Y. 498.

**SUBDIVISION 5.****Of Character.**

If the plaintiff up to the time of his arrest uniformly bore a good reputation, and the defendant knew of the same, such fact may be considered by the jury in connection with other evidence in determining whether or not the defendant had probable cause to believe the plaintiff guilty of the crime. *Limbeck v. Gerry*, 15 Misc. Rep. 663, 39 N. Y. Supp. 95.



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Evidence of the approval of plaintiff's arrest by bystanders is admissible to disprove the plaintiff's testimony that he was not making any disturbance when arrested. *Maguire v. Broadway, etc., Ry. Co.*, 42 St. Rep. 824, 16 N. Y. Supp. 922.

In an action for false imprisonment it was held no error to exclude an offer by the defendant to show that the plaintiff was an habitual litigant. *Palmeri v. Manhattan Ry. Co.*, 133 N. Y. 261, 44 St. Rep. 694, affirming 39 St. Rep. 23.

## SUBDIVISION 6.

## Of Damage.

Where an attorney has been wrongfully imprisoned he cannot show that his law business has been practically destroyed in consequence of his arrest unless such element of damage is specially pleaded, as such evidence is not admissible under a mere allegation that the plaintiff was greatly injured in his credit and reputation. *Evans v. Metropolitan Ry. Co.*, 47 App. Div. 511, 62 N. Y. Supp. 495, 96 St. Rep. 495.

Even though justification is not pleaded, evidence that the defendant had grounds to suspect the plaintiff of the crime may be shown upon the question of damages, as it tends to relieve defendant from the imputation that he acted from improper motives. *Brown v. Chadsey*, 39 Barb. 253.

Where the defendant, a physician, caused the confinement of the plaintiff under the supposition that she had smallpox, and delivered her to the hospital ambulance, evidence was held to be inadmissible which tended to show that the driver of the ambulance, instead of going directly to the hospital, had deviated from his course and taken in a colored woman affected with the smallpox. So, too, evidence was held to be inadmissible tending to show that when the plaintiff left the hospital part of her clothing was detained there by some person in charge. It was held that the damages this testimony tended to show were not the legal and consequent damages arising from the act complained of. *Rider v. Fuller*, 13 Hun, 667.

## SUBDIVISION 7.

## Records and Process as Evidence.

Where an action is brought against defendants as individuals for wrongfully arresting plaintiff under an execution against his person, it is error to exclude the execution offered for the purpose

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of connecting defendant with the arrest merely because they are therein stated to be executors. *Sherman v. Grinnell*, 70 Hun, 354, 53 St. Rep. 81, 24 N. Y. Supp. 59.

Judgment in a criminal action cannot be used in a civil suit to establish the facts upon which such judgment rests. "A judgment in a criminal prosecution is admissible in a civil case only to establish the fact of the rendition of the judgment, but it is not evidence of the facts upon which the judgment proceeded, that is, of the guilt of the accused." *Wilson v. Manhattan Ry. Co.*, 2 Misc. Rep. 129, 20 N. Y. Supp. 852.

Where the plaintiff was arrested at night and a complaint made against him on the following morning, the record of the proceedings following such complaint is admissible in an action for false imprisonment, as the arrest and imprisonment constitute one continuous act of imprisonment. The record of such proceedings is properly proved by the original record of the magistrate. *Shea v. Manhattan Ry. Co.*, 29 St. Rep. 313, 8 N. Y. Supp. 333, 15 Daly, 528.

In an action for false imprisonment the minutes of the justice showing the suspension of criminal sentence are admissible to show conviction. *Cuniff v. Beecher*, 84 Hun, 137, 32 N. Y. Supp. 1067, 66 St. Rep. 399.

A warrant under which the mother of a bastard child was committed for refusing to discover the putative father may be produced on trial by the plaintiff, and is evidence of the facts therein contained, until gainsaid by proof upon his part. *Scott v. Ely*, 4 Wend. 555.

The grounds upon which an arrest was made cannot be proved by the testimony of the magistrate issuing the warrant as the complaint must be in writing and is the best evidence. *Tacy v. Starks*, 67 App. Div. 422, 73 N. Y. Supp. 225, 107 St. Rep. 225.

## SUBDIVISION 8.

## Miscellaneous.

Evidence of what was said and done at the time of the arrest is competent. *Devoe v. Davis*, 12 Week. Dig. 544.

In a civil action for false imprisonment on charge of felony, evidence of the settlement of a criminal prosecution between plaintiff and defendant is not admissible to prove that the defendant did not prosecute. *Van Voorhes v. Leonard*, 1 S. C. 148.

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The burden is upon the plaintiff, and in order to recover he must show by a fair preponderance of evidence that he was arrested by the direction or procurement of the defendant and without probable cause. *Limbeck v. Gerry*, 15 Misc. Rep. 668, 39 N. Y. Supp. 95.

The exclusion of evidence regarding the disposition made by the grand jury of charges against the plaintiff is not an error. *Hopner v. McGowan*, 116 N. Y. 405.

For a case turning upon the necessary proof to connect the execution upon which the plaintiff was arrested with the judgment in an action, where the action was brought by defendant in attachment against his lessor, see *Brown v. Demont*, 9 Cow. 263.

The burden is upon the plaintiff to show that the defendant imprisoned him and deprived him of his liberty by unlawful means and want of probable cause. *Warren v. Dennett*, 17 Misc. Rep. 86, 39 N. Y. Supp. 830.

For a case where the plaintiff was arrested upon charge of blackmail, and where the court held there was sufficient evidence that the act of the person causing the arrest was instigated by defendant to permit it to go to the jury, see *Carson v. Dessau*, 142 N. Y. 445, overruling 36 St. Rep. 425.

For a case where it was held that the arrest of plaintiff for obtaining a horse and wagon from a livery-stable upon false pretenses was justified, see *Olmstead v. Doland*, 6 N. Y. Supp. 130.

Where a commissioner of health of a city is required by law to take such measures as he may, with the approval of the mayor and president of the medical society, declare necessary for public safety, in case of an impending pestilence, it was held in an action for false imprisonment against such health commissioner that the proclamation of the commissioner and of the mayor and president of the medical society reciting that smallpox was epidemic, and that every citizen should be vaccinated, and that those not vaccinated should be quarantined, was held to be admissible in evidence on behalf of the commissioner, and that he should also be allowed to prove the number of cases of the disease and to introduce a map showing the locality of the cases and to prove the infection and contagious character of the disease, how this contagion is conveyed by air, clothing, utensils, etc. *Smith v. Emery*, 11 App. Div. 10, 42 N. Y. Supp. 258.

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Where improper evidence is received over objection, but subsequently, and before the testimony is closed, the judge orders the same to be stricken out and directs the jury to disregard it, the error is not cured if the verdict cannot be supported without such evidence. *Mandeville v. Guernsey*, 51 Barb. 99.

Where in an action for false imprisonment the plaintiff had been allowed to testify that he did not know that a judgment upon which he had been arrested had been recovered against him, it was held error to refuse evidence by defendant showing that the judgment had been obtained after trial, as this evidence would have directly contradicted the testimony of the plaintiff as to his recollection of the judgment. *Bergman v. Noble*, 45 Hun, 133, 19 Abb. N. C. 62.

An affidavit made to obtain a warrant in criminal proceedings stating that the accused procured money by fraudulently representing that he was authorized to receive it for the complainant, and with intent to deceive and defraud the complainant, does not offer proof of criminal offense, and a warrant issued thereon is void. *Devoe v. Davis*, 12 Week. Dig. 544.

For a case where the plaintiff had been arrested for shoplifting and the verdict in her favor was held to be against the weight of evidence, see *Tobin v. Bell*, 73 App. Div. 41, 76 N. Y. Supp. 425, 110 St. Rep. 425.

## ARTICLE XV.

## PROCEDURE AND TRIAL.

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## SUBDIVISION 1.

## Miscellaneous.

As to right to arrest in action for false imprisonment see Code Civ. Proc., § 549.

By virtue of section 3177 of the Code of Civil Procedure it is provided that in the City Court of New York, in a case specified under section 317 of the Code, the plaintiff may apply for an order of arrest to accompany the summons. For the contents of an order of arrest and the proceedings thereon, see § 3178 *et seq.*

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An action against a public officer for false imprisonment of the plaintiff in a foreign country must be brought in the county where the cause of action, or some part of it, arose. *Tupper v. Morin*, 25 Abb. N. C. 402, 12 N. Y. Supp. 310.

**SUBDIVISION 2.****Nonsuit and Charge.**

As a warrant showing a case within the jurisdiction of the justice issuing it is a protection to a ministerial officer acting under it, it is error for the court to refuse a nonsuit, or to refuse to charge that such warrant is a protection to the officer and that he is entitled to a verdict. *Smith v. Warden*, 4 Hun, 787.

It is error to dismiss a complaint as to one of two defendants where there is evidence that he was instrumental in causing the issuance of an execution upon which the arrest was made. *Sullivan v. Newman*, 43 St. Rep. 893, 17 N. Y. Supp. 424.

It is improper to dismiss a complaint at the end of the plaintiff's evidence on the ground that the plaintiff had failed to show want of probable cause and malice on the part of defendant, when the court would not be justified in holding, as matter of law, that the defendant had grounds for reasonable suspicion such as to warrant a cautious man in believing the plaintiff guilty of the offense. Nor is the situation changed so as to warrant direction of a verdict at the close of defendant's case by the fact that the evidence on the part of the defendant contradicted in substantial respects the evidence on the part of the plaintiff. *De Matteis v. La Maida*, 74 Hun, 432, 57 St. Rep. 178, 26 N. Y. Supp. 471.

For a case where it was held that a nonsuit was improper because the question as to whether plaintiff had committed a crime was a question for the jury, see *Smith v. Botens*, 36 St. Rep. 53, 13 N. Y. Supp. 222.

The question as to probable cause is for the jury. See *Neil v. Thorn*, 17 Hun, 144, where, under the circumstances, it was held error for the court to charge as matter of law that there was no reasonable cause.

For a case involving a charge as to probable cause, malice, and comments upon the evidence by the court, see *Murray v. Friensberg*, 15 N. Y. Supp. 450, 39 St. Rep. 600.

For a case where the charge of the court in respect to the ques-

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tion of damages was held to be error, see *Catlin v. Pond*, 101 N. Y. 649.

Where defendants testified that the plaintiff was arrested for disorderly conduct and yelling on the street, it was held error for the court to charge that no question of disorderly conduct or breach of the peace could arise in this action; the question whether there was a breach of the peace should have been sent to the jury. It should further be charged that if they found affirmative evidence upon this point and that the officer made the arrest upon his own responsibility, a verdict should be rendered in favor of defendant. *Lewis v. Kahn*, 25 St. Rep. 595, 5 N. Y. Supp. 661, 15 Daly, 326.

Where the plaintiff was arrested on a charge of having stolen money, and where he denied having taken it, it was held to be proper to submit the question to the jury as to whether a theft had been committed with an instruction that if there had been a theft probable cause was shown. It is also proper for the court to charge that a verdict for the plaintiff cannot be found unless no theft had been committed and the charge had been made maliciously. *Atwood v. Beirne*, 73 Hun, 547, 57 St. Rep. 264, 26 N. Y. Supp. 149.

Where a jury has been instructed that they may give punitive damages, the court is not bound, unless requested, to inform the jury of the nature of such malice as will justify such damage. *Craven v. Bloomingdale*, 30 Misc. Rep. 650, 64 N. Y. Supp. 262, 98 St. Rep. 262, reversed 171 N. Y. 439.

Where the plaintiff failed to produce his wife as a witness, or to account for her absence, in a case where an action was brought to recover damages for an arrest made upon the charge of plaintiff's misconduct with such woman before he married her, it was held that the court was justified in charging that the jury were at liberty to consider that the woman's evidence would not have been favorable to the plaintiff. *Carpenter v. Penn. R. R. Co.*, 13 App. Div. 328, 43 N. Y. Supp. 203.

Where the evidence shows an intentional and wanton invasion of the plaintiff's civil rights, the court may refuse to charge that there is no evidence of malice, and may charge that exemplary damages may be awarded if the jury find malice. *Kolzern v. Broadway & Seventh Avenue Ry. Co.*, 1 Misc. Rep. 148, 48 St. Rep. 656, 20 N. Y. Supp. 700.

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The charge that "when an arrest is made without probable cause and the person is afterward discharged, the law will presume it to be malicious," was held to be sound. *Murray v. Friensburgh*, 39 St. Rep. 600, 15 N. Y. Supp. 450.

See *Savage v. McMillan*, 37 App. Div. 103, 55 N. Y. Supp. 1055, for a case where under the facts proved it was held to be proper for a judge to charge that on the question of probable cause the plaintiff was entitled to recover, and that the only question for the jury was the amount of damages.

Where it appears in fact that the defendant was the prosecutor, causing arrest of plaintiff upon a criminal charge, and where the defendant identified plaintiff as one from whom he had received stolen goods, but upon examination defendant could not positively swear that she had pawned the goods, and plaintiff was discharged, it was held error for the court to refuse to charge that if the defendant accused plaintiff in good faith the plaintiff could not recover, except with the qualification that the defendant had reasonable grounds for believing her guilty. It was held that an action for false imprisonment could not be maintained and that if he acted in good faith he could not be charged with the subsequent prosecution. *Farnam v. Feeley*, 56 N. Y. 451.

It is reversible error for the court to charge that arrest and detention was unlawful because there was absence of reasonable cause to belief that plaintiff was guilty, if the fact as to reasonable cause is in controversy. *Thompson v. Fisk*, 50 App. Div. 72, 63 N. Y. Supp. 352, 97 St. Rep. 352.

It is held to be proper to charge that if there was no probable cause for making the complaint on which the plaintiff was arrested, yet if in making it the conductor did not act with a malicious purpose or with actual malice, defendant was entitled to a verdict. It was also held where the plaintiff was arrested for failing to purchase a ticket on the train, and where the defendant requested the court to charge that the plaintiff when applied to by the conductor was obliged to produce a proper and valid ticket as evidence of his right to ride, or else pay his fare, that it was proper for the court to reply "If he could do so, he was." "If he had a ticket and lost it, it was a subject of explanation. It was his duty either to produce a proper ticket, or pay his fare, or make some reasonable explanation why he didn't do it."

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It was further held that under the circumstances of the case it was proper to charge that the damage was substantial and not nominal. And that it was proper for the court to charge that if the conductor made the criminal complaint for the sole purpose of collecting a debt and to prove himself right the jury must find malice. It was also held that under the circumstances it was proper to charge that the conductor was chargeable with the knowledge of his assistant that the plaintiff had delivered unpunched tickets to him. *Toomey v. D., L. & W. R. R. Co.*, 53 St. Rep. 567, 24 N. Y. Supp. 108.

It is sufficient that the charge to the jury is in substantial accordance with the request, although the judge declines to adopt the particular language used. Speaking of a charge in question the court said: "On the question of malice, he (the judge) properly declined to withdraw the issue from the consideration of the jury. He instructed them that if there was probable cause for the complaint, even though it was made from malicious motives, their verdict should be for the defendant." *Fay v. O'Neill*, 36 N. Y. 11.

Where a complaint united an action for malicious prosecution with one for false imprisonment, and where the judge charged the jury to assess damages in the action for false imprisonment, if they found that the other action was not sustained, it was held that the defendant was not prejudiced by the refusal of the judge to dismiss the complaint as to the action for malicious prosecution. *Thorne v. Turck*, 94 N. Y. 90.

**SUBDIVISION 3.****Verdict, Costs, and Appeal.**

The rule that in an action for assault the jury may find against one defendant and in favor of the other does not apply where such defendants answer jointly and make an admission which supplies a lack in the evidence. *Murphy v. Kron*, 20 Abb. N. C. 259.

A judgment in false imprisonment against joint tort feors cannot stand as to one and be reversed as to the other, for erroneous instructions as to the latter; it will be reversed *in toto*. *Lewis v. Kahn*, 5 N. Y. Supp. 661, 25 St. Rep. 595, 15 Daly, 326.

As to reversing a judgment against joint tort feors the court said, in *Farrell v. Friedlander*, 63 Hun, 257, 18 N. Y. Supp. 215: "Judgment here having been against joint tort feors, as it must



## Art. 16. Damages.

be reversed as to the one, it is doubtful if it can be permitted to stand as to the other." Citing *Lewis v. Kahn*, *supra*.

By virtue of section 3228, subdivision 3, of the Code if "in an action to recover damages for \* \* \* false imprisonment \* \* \* the plaintiff recovers less than fifty dollars damages, the amount of his costs cannot exceed his damages."

It was held in an action for false imprisonment that where the case was presented to the jury upon an erroneous theory, that the question presented could be reviewed in the Appellate Division, although no exception was taken. *Vorce v. Oppenheim*, 37 App. Div. 69, 55 N. Y. Supp. 596.

## ARTICLE XVI.

## DAMAGES.

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## SUBDIVISION 1.

## Compensatory Damages.

While malice or want of probable cause is no part of the plaintiff's case in an action for false imprisonment, proof that the plaintiff believed himself to be legally right in making an improper arrest will mitigate exemplary damages, but will not diminish actual damages. *Hale on Torts*, 251, citing *Sleight v. Ogle*, 4 E. D. Smith, 445; *Holmes v. Blyler*, 80 Iowa, 365, 45 N. W. 756; *Livingston v. Burroughs*, 33 Mich. 511; *Tenney v. Harvey*, 63 Vt. 520, 22 Atl. 659.

In estimating the actual damage sustained by the plaintiff, who had been illegally arrested, the jury may include compensation for the injury to plaintiff's feelings, and compensation for the insult and indignity to which he has been subjected. These items are considered as actual damage. *Rown v. Christopher & Tenth Sts. Ry. Co.*, 34 Hun, 471.

Where improper evidence in regard to damages has been received, and the jury is subsequently told to disregard it, the verdict will not be disturbed if, under the circumstances, it would be warranted by the testimony. *Mandeville v. Guernsey*, 51 Barb. 99.

Indemnity may be given for injury to reputation, feelings, health, mind, and person, caused by the arrest, together with the

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expenses of the defense. *Fagnan v. Knox*, 8 J. & S. 41, reversed 66 N. Y. 525, on other grounds.

Though a passenger, wrongfully imprisoned, may recover for the loss of earnings during the imprisonment, he cannot recover for loss of employment for some months in consequence of his failure to keep an appointment on the morning after his arrest, such loss not being deemed the proximate consequence of his detention. *Carpenter v. Pennsylvania R. R. Co.*, 13 App. Div. 328, 43 N. Y. Supp. 203.

Where, in an action for false imprisonment, the damages are unliquidated, the amount is in the discretion of the jury, and their determination will not be disturbed except for a plain abuse of discretion. *Craven v. Bloomingdale*, 30 Misc. Rep. 650, 64 N. Y. Supp. 262, 98 St. Rep. 262, citing *Pastor v. Reagan*, 9 Misc. Rep. 547, 30 N. Y. Supp. 657.

In *Sullivan v. Newman*, 43 St. Rep. 893, 17 N. Y. Supp. 424, it was held that, where the plaintiff had been detained from home for six weeks, his business had been interrupted, and he had been put to the expense of procuring his discharge, a verdict in his favor for \$43 was not adequate, and, in connection with other errors, was ground for a new trial.

An attorney who issues an unlawful body execution, under special instruction from his client, is not liable to the debtor for damages caused by reason of his confinement by the sheriff among prisoners. "For that violation of the law, the sheriff was responsible, and he alone." *Baker v. Secor*, 22 St. Rep. 97, 4 N. Y. Supp. 303. It was also held in this case that, in an action against the attorney for the false imprisonment, the attorney is entitled to have the jury, in assessing damages, credit the amount received by the plaintiff from the execution creditor, by the discharge of the judgment on which the execution was issued.

Special damage to an attorney's business, caused by his arrest, must be specially pleaded. It is not admissible, under a general allegation, that he was greatly injured in health, credit, reputation, etc. *Evans v. Metropolitan St. Ry. Co.*, 47 App. Div. 511, 96 St. Rep. 495, 62 N. Y. Supp. 495.

It would seem to be implied, in the opinion in *Sullivan v. Newman*, 43 St. Rep. 893, 17 N. Y. Supp. 424, that the plaintiff's expenses in procuring his discharge from arrest is a proper item of damage.

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Where a divorced husband illegally procured the arrest of his divorced wife, for refusing to give up possession of a child, the custody of which had been awarded to him, a verdict of \$3,000 damages was held not to be excessive where the plaintiff was taken to a public place and conducted through the street to the station-house, and detained in the lockup under circumstances which humbled and humiliated her. *Monjo v. Monjo*, 53 Hun, 145, 25 St. Rep. 150, 6 N. Y. Supp. 132.

In *Ball v. Harrigan*, 47 St. Rep. 384, 19 N. Y. Supp. 913, it was held that humiliation, insults, and wounded sensibilities are all subjects of compensation, and not of punitive damages, which depend upon malice, and, in consequence, it was held that a verdict of \$450 was not excessive where the plaintiff, a girl, was detained by the defendant in a police box to await the police wagon, and was compelled to go on the same and go to the police station, under a charge of having kicked over the defendant's barrel, which had, in fact, been done by some boys.

The fact that the plaintiff is a female is material in an action for false imprisonment, as affecting the kind and degree of mortification and inconvenience caused by the arrest. *Dodge v. Alger*, 53 N. Y. Super. 107. See also *Monjo v. Monjo*, 53 Hun, 145, 6 N. Y. Supp. 132.

Where the plaintiff, a woman, was imprisoned for seven hours and stripped naked before the gaze of strange men, it was held that a verdict of \$800 was not excessive. *McKelvey v. Marsh*, 63 App. Div. 396, 71 N. Y. Supp. 541, 105 St. Rep. 541.

The fact that the plaintiff has a family is material, on the kind and degree of mortification and inconvenience caused by the arrest. *Dodge v. Alger*, 21 J. & S. 107.

It seems that, even where a jury is restricted to actual damages in an action for false imprisonment, they may, in estimating such damages, include injury to the plaintiff's feelings, compensation for the insult, and indignity to which he has been subjected. *Rown v. Christopher, etc., Ry. Co.*, 34 Hun, 475.

In *Strang v. Whitehead*, 12 Wend. 64, it was held that the expenses of the plaintiff, for legal services in procuring his discharge from an illegal arrest, are not admissible in an action for false imprisonment, unless such expenses are specially pleaded. Such expenses are not the legal and natural result of the act complained of. The admission of evidence of such expenses is ground for new trial.

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The amount of counsel fees and costs of plaintiff in defending a prosecution are matters of special damage, and must be pleaded and proven to be recovered. *Thompson v. Lumley*, 7 Daly, 74.

The plaintiff may recover for the time and expenses incurred in procuring his discharge by *habeas corpus* from false imprisonment, although the warrant on which defendant procured the imprisonment was void on its face. *Blythe v. Tompkins*, 2 Abb. Pr. 468; *Williams v. Garrett*, 12 How. Pr. 456.

The plaintiff may recover his expenses incurred in procuring his discharge by *habeas corpus*. *Williams v. Garrett*, 12 How. Pr. 456.

## SUBDIVISION 2.

## Punitive Damage and Mitigation.

Where an arrest was wanton and oppressive, and in open disregard of the plaintiff's right to personal liberty, it may be said that legal malice has been shown, and punitive damages are proper. *Craven v. Bloomingdale*, 30 Misc. Rep. 650, 64 N. Y. Supp. 262, 98 St. Rep. 262, citing *Muckle v. Rochester R. R. Co.*, 79 Hun, 33, 29 N. Y. Supp. 732; *Kolzern v. Broadway Ry. Co.*, 1 Misc. Rep. 148, 20 N. Y. Supp. 700, reversed 171 N. Y. 439.

The plaintiff's right to punitive damages cannot be denied, in a case where the arrest was illegally made under a village ordinance prohibiting the riding of bicycles on the sidewalk, merely upon the ground that the plaintiff had previously committed the same act. *Fuller v. Redding*, 16 Misc. Rep. 634, 39 N. Y. Supp. 109.

Punitive damages may be awarded where an illegal arrest is malicious and wanton. *Limbeck v. Gerry*, 15 Misc. Rep. 663, 39 N. Y. Supp. 95.

In a case where a woman was searched in defendant's store, upon the accusation of having stolen goods, and pursuant to a system which had been adopted in such store, it was held that punitive damages could be awarded, although there was no evidence of express malice. *Stevens v. O'Neill*, 51 App. Div. 364, 64 N. Y. Supp. 663, 98 St. Rep. 663.

Punitive damages may be given in an action for false imprisonment under proper instructions from the court. *Mann v. Barrows*, 14 St. Rep. 10, citing *Hunt v. Bennett*, 19 N. Y. 173; *Brooks v. Harrison*, 91 N. Y. 83.

Where the question of probable cause is left to the jury, and

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depends upon whether or not a felony has been committed, it seems that punitive damages are proper if the jury finds that no felony has been committed. *Atwood v. Beirne*, 73 Hun, 547, 26 N. Y. Supp. 149, 57 St. Rep. 264.

The jury may give damages beyond mere compensation in actions for false imprisonment, or inflict punishment upon defendant for his conduct, though not in an arbitrary amount. *Brown v. Chadsey*, 39 Barb. 253.

By virtue of section 3035, Code of Civil Procedure, a sheriff or jailer who refuses to discharge a prisoner committed by virtue of an execution issued by a justice of the peace, etc., after receiving proper evidence, etc., as provided for in sections 3032-3034, forfeits \$25 for each day's detention of the person, to be recovered by the person detained, in addition to any damages he may have sustained by reason of the false imprisonment.

Where the evidence in an action for false imprisonment showed an intentional and wanton invasion of the plaintiff's civil rights, the court may refuse to charge that there is no evidence of malice, and may properly charge that the jury may award punitive damages if they believed that the arrest was accompanied by malice. *Kolzern v. Broadway & Seventh Ave. Ry. Co.*, 1 Misc. Rep. 148, 48 St. Rep. 656, 20 N. Y. Supp. 700.

Where evidence was given of the ill-will and malice of the defendant toward the plaintiff, and that defendant had made threats against him, and where he procured an illegal warrant directing a search of plaintiff's premises, it was held that a verdict for \$1,000 damages was not excessive. *Johnson v. Comstock*, 14 Hun, 238. (Note, this case was in trespass, and not false imprisonment.)

A client is not liable for punitive damages for the act of his attorney, in unlawfully issuing execution against the person of the plaintiff, unless the attorney, if sued, would himself be liable, if he acted without malice and under a mistake of law. *Cotton v. Adirondack R. R. Co.*, 15 Week. Dig. 256.

If there is no evidence of bad faith in the transaction, punitive damages should not be awarded. *Williams v. Garrett*, 12 How. Pr. 456.

Though a railroad corporation is liable for the willful acts done or omitted by its servants in the course of their employment to the extent of the actual injury sustained, yet it cannot be held liable

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for punitive damages unless it is shown to have been guilty of gross negligence or misconduct. *Fisher v. Metropolitan El. Ry. Co.*, 34 Hun, 433.

In an action for false imprisonment and malicious prosecution against a railroad company by a person arrested by special officer, punitive damages cannot be awarded against the company unless it be shown that they authorized or ratified the arrest or had knowledge that the officer was not fit for the duties. *Kastner v. Long Island R. R. Co.*, 76 App. Div. 323, 78 N. Y. Supp. 469, 112 St. Rep. 469.

Where an arrest was made by a detective employed by a railroad corporation, and there was no evidence of ill-will, malice, or wanton disregard of plaintiff's right in making the arrest, and where the same was made in good faith and upon warranted suspicion, it was held that the railroad corporation was not liable for exemplary damages. *Newman v. N. Y., L. E. & W. R. R. Co.*, 54 Hun, 335, 27 St. Rep. 135, 7 N. Y. Supp. 560.

Where the defendant, an attorney, secured an illegal body execution against the plaintiff, under which he was arrested and imprisoned, it was held that there being no proof of malice the jury could award him such damages as necessarily and naturally resulted from the arrest, but that a verdict awarding damages in excess of this should be set aside. The verdict in this instance was \$5,000, and was set aside. *Baker v. Secor*, 6 St. Rep. 735.

Where a first verdict for \$3,000 was set aside as excessive, the court refused to set aside a subsequent verdict of \$2,750. *Dodge v. Alger*, 21 J. & S. 107.

For a case where the verdict was set aside as excessive, see *Bocock v. Cochran*, 32 Hun, 521. Also *Baker v. Secor*, 6 St. Rep. 735.

In *Thorp v. Carvalho*, 14 Misc. Rep. 559, 36 N. Y. Supp. 1, it was held that a verdict of \$1,000 was not excessive, though the plaintiff was only locked up for one and one-half hours. "In arriving at the amount of damages he has suffered we must consider the injury to his reputation besides any actual injury he has sustained. It is difficult to measure the damage suffered by any one in his business and private reputation, but under the circumstances of this case we do not think that the verdict should be set aside as excessive, or that the jury were influenced by prejudice in awarding the amount they did."

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Where a case does not disclose that any point is made as to the right of the plaintiff to recover punitive damages, and there is no exception upon this point, the Court of Appeals has no authority to review the question as to excessive damages or to determine whether the damages recovered were larger than was warranted by the testimony. *Thorne v. Turck*, 94 N. Y. 97.

The defendant may give evidence tending to explain his motives for the purpose of mitigating punitive damages. *Brown v. Chadsey*, 39 Barb. 253.

Wherever exemplary damages are claimed all the circumstances connected with the transaction tending to explain the motive of the defendant, both to show that he acted maliciously and also to show that he acted in an honest belief that he was justified, or that he acted under a sudden impulse and passion caused by plaintiff's conduct, are admissible in evidence. So held in an action for assault and battery and false imprisonment. *Voltz v. Blockmar*, 64 N. Y. 440.

*Craven v. Bloomingdale*, 30 Misc. Rep. 650, 64 N. Y. Supp. 262, affirmed 54 App. Div. 266, cited on p. 647. This suit was reversed 171 N. Y. 439, and it was *held*, that the master cannot be held for vindictive, wanton, or malicious acts of the servant, unless there is proof to implicate the master and make him *particeps criminis* in the acts of the servant. It must appear, in order to hold the master in such case, that he expressly or impliedly authorized or ratified them.

## CHAPTER XV.

### LIBEL AND SLANDER.

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#### ARTICLE I.

##### HISTORY — BIBLIOGRAPHY.

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##### SUBDIVISION 1.

###### Historical.

A very full and complete resumé of the history of Law of Defamation is given in Newell on Libel and Slander, pages 1-31, reviewing the acts of the ancient lawmakers, commencing with the Mosaic law and citing largely from Pentateuch and Psalms. The most interesting, although, perhaps, not most instructive, citation being from Deuteronomy XXII, 13 to 19. This is followed by citations as to the laws of ancient Egypt, comments upon Athenian law, and a very full abstract of the Civil law upon the subject, in the course of which he contrasts the subtleties of our law upon the subject with the Civil law, saying: "The Roman



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Law had at least the merit of simplicity." He says Justinian in the Institutes classed libel and defamation as a private injury of the highest degree, citing from the Institutes the statement "Injury may be done, not only by beating and wounding, but also by slanderous language \* \* \* by writing a defamatory poem or history, or by maliciously causing another so to do." The treatment of the topic shows careful examination and thorough research.

The earlier history of the English Law of Defamation, says a writer in the *Encyclopædia Britannica*, is somewhat obscure. Civil actions for damages seem to have been frequent so far back as the reign of Edward I, but at that time there was no distinction between words written and spoken, and, in some instances, such cases were within the jurisdiction of the Ecclesiastical Courts. It is stated further that the first fully reported case in which libel is affirmed generally to be punishable at common law was tried in the Star Chamber in the reign of James I.

Newell (p. 30) states that no action for slanderous words appears to have been brought before the reign of Edward III, and that this action was so rare even then that but one is found during the whole reign of that prince. He traces the growth of the action down to the time of Coke, in a single volume of whose reports seventeen adjudged cases are to be found on the subject.

The principal historical interest of the law of libel relates to indictments for libel on the criminal side of the court in connection with the rulings of Lord Mansfield in the celebrated State trials about the commencement of the last century in which Erskine appeared for the defendants, and insisted that the jury should determine the question as to whether the language used was or was not a libel. The agitation of the subject resulted in the passage of what was known as "Fox's Libel Law," by which the jury were entitled to give a general verdict in criminal cases on the whole matter put in issue.

### SUBDIVISION 2.

#### Text-Books and Authorities.

In addition to the standard works upon torts in which this subject is treated more or less fully, several treatises are exclusively devoted to the law of libel and slander.

Holt's Law of Libel, first American edition, 1818, is the ear-

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liest in point of time, but has become practically obsolete. Starkie was for many years a standard work on the subject and passed through at least three American editions, and several English editions by Folkard, one so late as 1897, but has been superseded by later works in this country.

Flood's Treatise, published in London in 1880, is but little known here, and does not seem to have been republished in America. The work of Odgers is best known and most frequently cited in England. Fraser on the Law of Libel and Slander has recently gone through a third edition. Townshend on Libel and Slander was first published in 1868, and has gone through four editions, the latest being 1890. It is a standard treatise. It contains a very complete bibliography of the subject, and has been followed by Newell's work, first published in 1890, second edition in 1897, which is, aside from being a treatise upon the subject, a full digest of the English and American authorities.

The subject is treated in Wait's Action and Defenses; Slander (vol. 5), page 727, etc.; Libel (vol. 4), page 281, etc.

The American and English Encyclopædia of Law (2d ed., vol. 18), at page 851, contains a very complete and carefully prepared digest of the law upon this subject, citing a large number of English and American authorities.

Elliott on Newspaper Libel (London, 1884) is a monograph pointing out how the law has been modified as to newspaper libel by Act of Parliament of 1881.

The Law of the Press, by Fisher & Strahan (London, 1898), deals exclusively with that phase of the law of libel expressed in the title.

**ARTICLE II.****DEFINITIONS AND DISTINCTIONS.**

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**SUBDIVISION 1.****Libel and Slander Distinguished.**

Defamation is false imputation upon one's character, or reputation, in the way of slander or libel. Whenever language is

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spoken of as defamatory it is understood to be false. Bigelow on Torts, 149.

Defamation may be either oral or written; in the former case it is called Slander; in the latter Libel. Underhill on Torts, 119.

Defamation is a false publication calculated to bring one into disrepute. Hale on Torts, 281.

It is divided into two classes, written defamation called libel, oral defamation termed slander. Pollock on Torts, 287; Newell on Slander and Libel, 32.

"Libel is defamation published by means of writing, printing pictures, images, or anything that is the object of sight. Slander is defamation without legal excuse, published orally, by words spoken, being the object of the sense of hearing. Both libel and slander are but different methods of accomplishing the same wrong, differing mainly in the manner of publication." Newell on Slander and Libel, 33; Cooley on Torts, 193.

A defamatory statement is a statement concerning any person which exposes him to hatred, ridicule, or contempt, or which causes him to be shunned, or avoided, or which has a tendency to injure him in his office, profession, or trade. Such a statement, if in writing, printing, or other permanent form, is a libel; if in spoken words or significant gestures, a slander. Fraser, 90.

"It is well settled that an action may be maintained for the publication of written words when it could not be maintained for the publication of the same words by mere oral discourse; the rule being, in short, that oral words which tend to disgrace the person of whom they are spoken, and which do not impute the commission of crime are not actionable without proof of special damage, whereas written words, the manifest tendency of which is seriously to hurt another's reputation, are actionable without proof of special damage, even though the commission of no crime be imputed." 18 Am. & Eng. Encyc. of Law (2d ed.), 863.

A favorite distinction is that in slander intelligence is communicated to the sense of hearing; in libel, to the sense of sight. Another is that in slander, the defamatory matter has a fugitive form. In libel it is embodied in a permanent form. In slander, a production and publication are identical; while in libel its production is one thing and its publication another. Hale on Torts, 283; Cooley, 193.

Abusive words, which if spoken only, would not be actionable,

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may become so when written, printed, or published. 4 Waite's Actions and Defenses, article Libel, 282, citing *Savile v. Jardine*, 2 H. Bl. 532; *Chase v. Whitlock*, 3 Hill, 139.

Written utterances are, in the absence of special ground, of justification or excuse, wrongful as against any person whom they tend to bring into hatred, contempt, or ridicule. Spoken words are actionable only when special damage can be proved to have been their proximate consequence, or when they convey imputations of certain kinds. Pollock on Torts, 288.

Actionable words are doubtless such as naturally imply damage to the party; but it must be borne in mind that there is a marked distinction between slander and libel, and that many things are actionable when written or printed and published which would not be actionable if merely spoken, without averring and proving special damage. *Pollard v. Lyon*, 91 U. S. 225 (228), citing *Clement v. Chivis*, 9 Barn. & Cres. 174; *McChurg v. Ross*, 5 Binn. 219.

False defamatory words, if written and published, constitute a libel; if spoken, a slander. *Chase v. Southwick*, 9 Johns. 214.

Gaynor, J., in *Cady v. Brooklyn Union Publishing Co.*, 23 Misc. Rep. 409, 51 N. Y. Supp. 198, cites numerous authorities and considers very fully the distinction between libel and slander. He also discusses what constitutes libel, in a civil, and what in a criminal, proceeding.

"Verbal imputations, however gross, may die with the breath which sent them forth, and be forgotten with the excitement which produced them. But written or printed charges of the same import remain permanently upon the record, and by means of the press are multiplied and sent abroad through the world, as far as the name or fame of the injured individual may extend, to destroy his character and embitter his feelings through his whole life, and even to degrade his memory in the estimation of those who may come after him. The distinction stands on a broad and rational foundation, and should not therefore be subverted unless we are compelled to do so by precedents bearing directly upon the question. The distinction has been long recognized and acted upon, and seems to be firmly established." *Stone v. Cooper*, 2 Den. 293 (305).

"There is a distinction between oral and written or printed slander, which is noticed in all the books; and the latter is deemed

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much more pernicious, and will not so easily admit of justification." *Dole v. Lyon*, 10 Johns. 460.

"It may be observed that there exists a decided distinction between words spoken, and written slander. To maintain an action for the former cause, the words must either have produced a temporal loss to the plaintiff, by reason of special damage sustained from their being spoken, or they must convey a charge of some act criminal in itself, and indictable as such, or they must impute some indictable offense involving moral turpitude. To maintain an action for a libel it is not necessary that an indictable offense should be imputed to the plaintiff. If a libel holds a party up to public scorn, contempt, and ridicule, it is actionable. (9 Johns. 214, 7 Johns. 264.)" *Van Ness v. Hamilton*, 19 Johns. 367.

The definition of libel is much broader than that of slander. Every slander is a libel, if published by writing, but there are many libels which are not slander. Any false publication by writing which exposes one to ridicule, hatred, contempt, or obloquy, or causes him to be shunned or avoided, is a libel *per se*, though if spoken it may be no slander. The definition of slander *per se* is not general, like that of libel, but is restricted and specific. *Simpson v. The Press Publishing Co.*, 33 Misc. Rep. 229, 67 N. Y. Supp. 401.

## SUBDIVISION 2.

## Doctrine of Special Damage.

Where the law does not presume damages the damage must be temporal and not too remote. To make that class of words actionable the consequences must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking of the words. Ringwood on Torts, 157-160.

It will be noted, as is stated by Bigelow on Torts, 155, that the clear distinction between the class of actions where words are actionable *per se*, and those which do not fall under those heads, is that the plaintiff, in the first instance, must prove damages in order to sustain the action, while in the classes defined as actionable *per se* damage is presumed.

Underhill on the Law of Torts (7th ed.), at p. 136, gives the following analysis of libel and slander bearing upon this point:

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"(1) The imputation must be false since the truth is a good defense. (2) It must be defamatory. (3) It must have been published. (4) It must have been either expressly or *impliedly* malicious, and in case of slander, but not of libel, a fifth element must exist, namely, actual damage must be proved unless it would be implied from the nature of the defamatory words. It follows that if any one of the first four elements enumerated in case of libel, or any one of the five in case of slander, is absent, the action cannot be maintained."

In order to maintain an action for slander where the words are not actionable *per se* the plaintiff must prove some definite temporal loss. *Fraser on Libel and Slander*, 21.

To maintain an action upon words which are not libelous or slanderous *per se* plaintiff must have suffered some special damage and the recovery is limited to compensation therefor. 18 Am. & Eng. Encyc. of Law, 1085.

Special damages are such as are not inferred from the words themselves. Such damages must be specially claimed in the pleading and evidence given on the trial as to the damage resulting therefrom. When on their face the words must have injured plaintiff's reputation, they are said to be actionable in themselves, but where this is not the case, evidence must be given to show some appreciable injury following their use. The rule is that all disparaging words become actionable when followed by special damage, such as the law does not deem too remote. *Newell*, 849, citing *Cook on Defamation*, 22; *Odgers*, 89; *Pollard v. Lyon*, 91 U. S. 225; *Griebel v. Rochester Printing Co.*, 14 N. Y. Supp. 848.

*Newell* further, at p. 851, lays down the rule that damages arising from the speaking of the words, not actionable in themselves, must be, first, actual and substantial; second, they must have occurred at the time of the commencement of the suit, and third, such damages must be the immediate consequences of the defamatory words. Citing to the latter proposition *Pettibone v. Simpson*, 66 Barb. 492.

The special damage arising from the use of words actionable *per se* must be averred in the complaint and proved upon the trial. *Langdon v. Scherer*, 43 App. Div. 607, 60 N. Y. Supp. 193, citing *Bassel v. Elmore*, 48 N. Y. 561.

In *Le Messina v. Storm*, 62 App. Div. 150, 70 N. Y. Supp. 882,

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the court considers cases in which it is necessary to allege and prove special damages, citing Odgers, p. 59, to the proposition that spoken defamatory words are actionable whenever special damage has in fact resulted from their use. Newell, p. 181, that "the real practical test by which to determine whether special damage must be alleged and proved in order to make out a cause of action for defamation, is whether the language is such as necessarily must, or naturally and presumably will, occasion pecuniary damage to the person to whom it is spoken."

In *Beech v. Ranney*, 2 Hill, 309, it is said (312), per Bronson, J.; "When the words charged are not actionable in themselves the plaintiff must allege and prove that by reason of the slander he has sustained some pecuniary damage. It is not enough that he has suffered pain of mind, lost the society or good opinion of his neighbors, or the like, unless he has also been injured in his estate or property. It is enough, however, that the slander has prevented the party from receiving something of value which would otherwise have been conferred, though gratuitously."

It is further held that the special damages alleged must be the natural and immediate consequences of the speaking of the words.

What constitutes special damage, and the method of proof will be considered under head of "Evidence" and "Damages." The necessity for alleging special damages in the pleading, under "Pleadings."

## ARTICLE III.

### REMEDIES.

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#### SUBDIVISION 1.

##### The Criminal Action.

Like many other personal injuries libel may become a crime. The matter is defined and governed by sections 242-245a of the Penal Code.

The crime consists only in libel, strictly speaking; the publication must be "otherwise than by mere speech."

A threat to publish a libel, or an offer to prevent the publication

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of a libel with intent to extort money, is a misdemeanor. See Penal Code, § 254.

So also is it a misdemeanor to furnish libelous information. Penal Code, § 254a.

Extortion by means of a threat to publish or connive at the publication of a libel may, under certain circumstances, be blackmail. Penal Code, § 558.

Written or verbal threats are misdemeanors. Penal Code, §§ 559, 560, 561.

## SUBDIVISION 2.

## The Civil Action.

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§ 1. **Jurisdiction.**—By virtue of section 2863 of the Code of Civil Procedure, subdivision 3, justices of the peace cannot take cognizance of a civil action to recover for libel or slander.

The justices' courts of Albany and Troy have no jurisdiction in slander and libel. See Code Civ. Proc., § 3223.

§ 2. **Statute of limitations.**—Under the provisions of subdivision 1, section 384, of the Code, actions to recover damages for libel and slander must be commenced within two years after the cause of action accrues. In *Solomon v. Bennett*, 62 App. Div. 56, 70 N. Y. Supp. 856, it is held that section 405 of the Code of Procedure must be so construed that an action for libel barred by section 384 is not saved from the operation of that statute by reason of an action having been commenced in the Federal court within two years after the cause of action accrued.

§ 3. **Survival and assignment of action.**—By section 3343, subdivision 9, of the Code, a personal injury is defined to include libel and slander. Subdivision 1 of section 1910 excepts an action to recover damages for a personal injury from those claims or demands which can be transferred or assigned. Hence a cause of action for libel and slander is not assignable.

By sections 1 and 2 of the Revised Statutes, relative to abatement of actions, originally contained in article 1, title 3, chapter 8, of part 3 (Heydecker's General Laws, 4970; Fiero Special Actions, 1203), actions for libel and slander are excepted from the



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provisions authorizing an action to be continued after the death of one of the parties, and in *Moore v. Bennett*, 65 Barb. 338, it is held that where the defendant in an action for libel died before final judgment, plaintiff was not entitled to an order continuing the action against the executor of the deceased defendant, for the reason that the action does not survive or continue. *Shayne v. Evening Post Publishing Co.*, 56 App. Div. 426, 67 N. Y. Supp. 937, held that an action for libel against a corporation abated upon the expiration of the life of the corporation by the limitation contained in its articles of incorporation, and could not be revived against the trustees of the corporation in office at the time of such expiration. This holding was, however, reversed on appeal (168 N. Y. 70), and it was held that the rule that a personal action dies with a person does not extend to the civil death of either persons or corporations. Hence an action for libel which has abated because of the dissolution of a corporate defendant may be continued and revived against the former directors of the defunct corporation in order to reach the assets of that corporation in their hands, as trustees, created by section 30 of the General Corporation Law for the benefit of stockholders.

**SUBDIVISION 3.****Remedy by Injunction.**

The earlier English doctrine was that the jurisdiction of chancery was limited to the protection of property rights which are remediless by the usual course of procedure at law, and that courts of equity would not restrain the publication of libels or works of a libelous character, even though such publications were calculated to injure the character, business, or credit of the person aggrieved, and that he would be left to pursue his remedy at law. *Newell*, 246a.

In *Schuyler v. Curtis*, 147 N. Y. 434, plaintiff brought an action to restrain defendants from making a statue or bust of a relative of plaintiff, and from causing it to be exhibited. The court held that such an action could not be maintained, and that the individual right of privacy which any person has during life dies with the person, and any right of privacy which survives is a right which pertains to the living only. The court does not appear to pass upon or even discuss the question as to whether the remedy sought by injunction could in any event have been

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granted, simply holding that upon the facts of the case there is no ground for relief on the merits.

. In *Marlin Fire Arms Co. v. Shields*, 171 N. Y. 384, Parker, Ch. J., collates and discusses the authorities in this and other jurisdictions upon the right to grant an injunction restraining a libel, and the language of 8 Pai. 24 is cited with approval, to the effect, that it was held in the Court of Chancery, that there was no jurisdiction to restrain the publication of a libel by injunction upon the bill filed by a party whose character or business would be injured by the publication. The opinion of Mr. Justice Bradley, in *Kidd v. Horry*, 28 Fed. 773, is discussed and followed. In that case the learned justice said: "The application seems to be altogether a novel one, and is urged principally upon the line of recent English authorities. An examination of these and other cases relied upon convinces us that they depend on certain peculiar acts of Parliament of Great Britain, and not on general principles of equity jurisprudence." But adds: "Neither the statute law of this country nor any well-considered judgment of the courts has introduced this new branch of equity into our jurisprudence. There may be a case or two looking that way, but none we deem of sufficient authority to justify us in assuming the jurisdiction." That case had been previously cited and followed in *De Wick v. Dobson*, 18 App. Div. 399, 46 N. Y. Supp. 390.

In *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, argued before the *Marlin Fire Arms Co. Case*, but decided immediately afterward, the court discusses the right of privacy and power of the court to grant an injunction restraining the use of lithographic likeness of plaintiff for business purposes, and holds that such right of privacy is not enforceable by injunction, although the discussion in the opinion of the chief judge seems to proceed entirely upon the lack of power to enforce the so-called right of privacy, and does not pass upon the question which was decided in the *Marlin Fire Arms Co. Case*, with reference to the right in any event to an injunction to restrain such publication. The opinion suggests that if the picture were libelous an action might lie, cites the English authorities holding the right to injunction to restrain a libel, and distinguishes them from the rule laid down in this State; also comments upon *Schuyler v. Curtis*, 147 N. Y. 434, above referred to. (See L. 1903.)

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In *Owen v. Partridge*, 40 Misc. Rep. 415, the court held, citing and following 171 N. Y. 538, that injury to character and reputation constitute nothing more than a libel and that the publication of an article cannot be restrained by injunction. So held where a person who had been arrested on suspicion of having committed a crime, and whose photographs and measurements were taken by the police department, sought to obtain a mandatory injunction to destroy or surrender the negative. Also held that plaintiff in that case could not have relief on the ground that his right of privacy had been invaded. Further held, that he could not have an injunction restraining the police department from exhibiting and publishing the photographs upon the ground that he was compelled to sit for his photograph, as that trespass was past.

## ARTICLE IV.

## SLANDER.

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## SUBDIVISION 1.

## Definition and Classification.

To make oral words actionable, unless special damage be shown, they must impute some offense against the law, punishable criminally, or the having a contagious disorder tending to exclude the party spoken of from society, or must be such as affect one injuriously in his office or trust, or in his trade, profession, or calling. To make written or printed words actionable, without proof of special damage, they must contain imputations which tend to subject one to disgrace, ridicule, or contempt. 18 Am. & Eng. Encyc. of Law (2d ed.), 866.

Slander is defined in 2 Kent's Comm. 16: "The injury consists in falsely and maliciously charging another with the commission of some public offense, criminal in itself, and indictable, and subjecting the party to an infamous punishment, or involving moral

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turpitude, or the breach of some public trust; or with any matter in relation to his particular trade or vocation, and which, if true, would render him unworthy of employment; or, lastly, with any other matter or thing by which special injury is sustained," citing *Brooker v. Coffin*, 5 Johns. 188; *Van Ness v. Hamilton*, 19 Johns. 349 (367).

In *Pollard v. Lyon*, 91 U. S. 225, opinion Clifford, J., at p. 226, it is said that definitions of slander will afford very little aid in disposing of any question ordinarily arising in such a controversy, unless where it becomes necessary to define the difference between oral and written defamation, or to prescribe the criterion to determine where special damage is claimed whether the pecuniary injury alleged naturally flows from the speaking of the words set forth in the declaration. The learned judge then gives a full and exhaustive definition of slander, citing numerous cases in England and this country, including the leading cases in this State; more especially upon the point as to when special damage must be proven in order to maintain the action.

The principle is well settled that to maintain an action for words spoken, the words must either have produced a temporal loss to the plaintiff, by reason of special damage sustained from their being spoken, or they must convey a charge of some act criminal in itself, and indictable as such, and subjecting the party to an infamous punishment, or they must impute some indictable offense involving moral turpitude, or the breach of some public trust, or with some matter in relation to his particular trade or vocation, and which, if true, would render him unworthy of employment. *Kinney v. Nash*, 3 N. Y. 177.

In opinion in *Moore v. Francis*, 121 N. Y. 199, at p. 203, it is said: "The cases of actionable slander were defined by Chief Justice De Grey, in the leading case of *Onslow v. Horne*, 3 Wils. 177, and the classification made in that case has been generally followed in England and this country. According to this classification, slanderous words are those which (1) import a charge of some punishable crime; or (2) impute some offensive disease which would tend to deprive a person of society; or (3) which tend to injure a party in his trade, occupation, or business; or (4) which have produced some special damage."

To this enumeration must be added the provision of the Code that in an action of slander brought by a woman for words imput-

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ing unchastity to her, it is not necessary to allege or prove special damages. § 1906.

The necessity for showing special damage exists both in slander and libel, where the words are not actionable *per se*, and is considered under article II, *supra*. Also Damages, art. XIV, subd. 1.

## SUBDIVISION 2.

## Words Imputing Crime.

The rule is that where the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to infamous punishment, then the words are in themselves actionable. *Brooker v. Coffin*, 5 Johns. 188.

In *Widrig v. Oyer*, 13 Johns. 124, the court was urged to hold the rule to be that there must be a crime *and* moral turpitude. It was held, however, that the rule laid down in *Brooker v. Coffin* was the best criterion for determining whether words spoken were actionable. This rule was approved and followed in *Martin v. Stillwell*, 13 Johns. 275; *Burtch v. Nickerson*, 17 Johns. 217; *Power v. Price*, 16 Wend. 450 (457); *Bissell v. Cornell*, 24 Wend. 354; *Halstead v. Nelson*, 36 Hun, 149; *Young v. Miller*, 3 Hill, 21; *Crawford v. Wilson*, 4 Barb. 504, where it is said also that Cowen, J., lays down the rule in *Young v. Miller*, 3 Hill, 25, that "every indictable offence, which is at the same time infamous or disgraceful in a general sense — any offence which detracts from the character of defendant as a man of good morals," is embraced in the class of offenses involving moral turpitude. The rule laid down in the principal case is again cited and followed in *Pike v. Van Wormer*, 5 How. Pr. 171.

The rule is considered in *Wright v. Paige*, 36 Barb. 438, opinion Bockes, J. It is said it is not enough that the words impute moral dereliction merely, but the offense charged must be also indictable, although it is not necessary that the offense should be punished by infamous punishment. This is held upon a review of the authorities, and it is further said that in *Alexander v. Alexander*, 9 Wend. 141, it was held sufficient to maintain the action, if the words charged would, if true, subject the party to criminal punishment of any description, stating that this case is cited, and that the rule is approved and adopted in *Young v. Miller*, 3 Hill, 21, where the words imputed a crime involving moral turpitude, and for which the offender might be proceeded

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against by indictment, but the crime charged was a misdemeanor and not a felony. In *Alexander v. Alexander* the words charged imputed "a crime involving moral turpitude," namely, the forging of defendant's name to petition to the legislature. *Bush v. Prosser*, 13 Barb. 221, is also cited where a recovery was allowed in slander, charging the defendant with keeping a bawdy-house, or house of ill-fame.

It is not enough, however, that the charge imputed involves turpitude in a moral sense, but it must constitute an indictable offense, upon conviction of which punishment may be inflicted. *Anonymous*, 60 N. Y. 262 (264).

Words charging a misdemeanor were held slanderous in *Brooks v. Harrison*, 91 N. Y. 83.

To constitute slander the charge need not be an offense at common law; it is enough that, if true, it would subject one to indictment. *Collyer v. Collyer*, 50 Hun, 422, 21 St. Rep. 118, 3 N. Y. Supp. 310, citing provisions of Penal Code constituting offense charged a crime.

An action will not lie for accusing the plaintiff of intention or attempt to commit a crime, if such attempt is not legally punishable. *Weed v. Bibbins*, 32 Barb. 315.

The words need not involve a positive charge of crime, but if by their fair construction they are intended as an imputation an action can be maintained. Such is the rule if they import a criminal charge in their ordinary and natural sense, and there need not be the same certainty in stating the crime imputed as would be requisite in an indictment for a crime. *Gorman v. Ives*, 2 Wend. 534; *Rundell v. Butler*, 7 Barb. 260; *Gibbs v. Dewey*, 5 Cow. 503; *Miller v. Miller*, 8 Johns. 74.

But there must be in some form an allegation that a specific crime has been committed, in order that an action may be maintained. *Steele v. Southwick*, 9 Johns. 214; *Andrews v. Woodmansee*, 15 Wend. 232; *Goll v. Delesderniers*, 26 Misc. Rep. 549, 57 N. Y. Supp. 475; *Hatfield v. Sisson*, 28 Misc. Rep. 255, 59 N. Y. Supp. 73, the latter case citing *Havemeyer v. Fuller*; 60 How. Pr. 316; *Hemmens v. Nelson*, 138 N. Y. 517.

A charge imputing a crime is actionable, unless the thing is understood by the person to refer to an innocent transaction, or an explanation is made which conveys to the bystanders the fact that no such criminal imputation is made. Explanations not

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heard by hearers of the slanderous words do not relieve plaintiff from responsibility. The explanation must not only accompany the words, but must be sufficiently explicit to enable those who heard them to understand what they referred to, and that the crime which the words would naturally impute was not intended to be charged. *Maybee v. Fisk*, 42 Barb. 326; *Van Aiken v. Caler*, 48 Barb. 58; *Phillips v. Barber*, 7 Wend. 439.

Although the words taken alone would be actionable as charging a crime, yet if they are both spoken and understood as referring to facts which do not constitute offense, an action cannot be maintained. As to say, "they are highwaymen, robbers, and murderers," uttered with reference to particular quarrel, not involving either of the crimes indicated; or calling a man "a thief," if the words were used as merely referring to an alleged overcharge for services; or the words "you are a thief; you stole hoop-poles from D's land," where it was left for the jury to decide whether it was meant to charge plaintiff with taking poles already cut, which would be a felony, or only to charge cutting down or carrying away timber to make hoop-poles, which would amount to charge of trespass only. *Van Rensselaer v. Dole*, 1 Johns. Cas. 279; *Quinn v. O'Gara*, 2 E. D. Smith, 388; *Roberts v. Champlin*, 14 Wend. 120; *Dexter v. Tabor*, 12 Johns. 239.

It must, however, in order to relieve defendant from responsibility appear that the facts could not in any view constitute the offense charged; as where plaintiff was charged with having "stolen" an article where it might have been felonious or not, according to the intent. The words, "You have stolen my wood," were not explained, and might or might not impute a crime. *Laine v. Wells*, 7 Wend. 175; *Alexander v. Alexander*, 9 Wend. 141; *Case v. Buckley*, 15 Wend. 327.

Where a slanderous charge is made which would be understood as imputing a crime, an action lies, although in the nature of things, such a crime could not have been committed unless it appears the charge was made only in the hearing of those who knew such a crime was impossible. *Kennedy v. Gifford*, 19 Wend. 296.

Where words were spoken of transactions which were innocent, but were spoken without attendant explanation, so that they might have been understood as imputing a crime, it was held the action was maintainable. *Phillips v. Barbour*, 7 Wend. 439.

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Where language employed imputes a crime the ordinary meaning is to be given to the words, unless they are accompanied by an explanation giving to them a different meaning, or unless all the hearers understand that they refer to the transaction which would not constitute the crime charged. *Hayes v. Ball*, 72 N. Y. 418.

The court is to inquire whether any connection in which the words were used were capable of construction imputing a crime, and whether they might have been so understood, and if the answer is in the affirmative it is a question for the jury whether defendant intended to charge a crime. *Warner v. Southall*, 165 N. Y. 496, citing *Hayes v. Ball*, 72 N. Y. 418.

An imputation conveyed in the form of a question as "Is M. H. the gentleman who wrote, etc., the individual who broke jail while confined on a charge of forgery?" may be actionable. *Hotchkiss v. Oliphant*, 2 Hill, 510.

It is not a defense to an action for charging plaintiff with the commission of a crime that the transaction referred to took place in another State, or was barred by the statute of limitations. *Van Ankin v. Westfall*, 14 Johns. 233.

Words charging a witness with swearing falsely in a judicial proceeding, imputing perjury, are actionable *per se*. *Spooner v. Keeler*, 51 N. Y. 527.

A charge of having sworn falsely in order to be actionable must be a charge that such evidence was given in a legal proceeding, and that the evidence given was material to the issue. *Brooker v. Coffin*, 5 Johns. 188; *Ross v. Rouse*, 1 Wend. 475; *Roberts v. Champlin*, 14 Wend. 120.

A mere general charge of having sworn falsely will not sustain an action for slander. *Hopkins v. Beedle*, 1 Cai. 347; *Vaughan v. Havens*, 8 Johns. 109; *Bullock v. Koon*, 9 Cow. 30.

But words "you have perjured yourself" are actionable. *Green v. Long*, 2 Cai. 91.

So if the charge of having sworn falsely is alleged to have been made with reference to evidence given at a trial. *Crookshank v. Gray*, 20 Johns. 344; *M'Kinly v. Rob*, 20 Johns. 351.

Any charge of false swearing which necessarily implies that it was committed in a legal proceeding gives foundation for an action. *Sherwood v. Chace*, 11 Wend. 38.

As to what constitutes a charge of perjury sufficient to sustain



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an action, see *Crawford v. Wilson*, 4 Barb. 504; *Walrath v. Nellis*, 17 How. 72; *Kern v. Towsley*, 51 Barb. 385.

No recovery can be had unless it is shown that the court or officer before whom the action was pending had jurisdiction of the subject-matter. *Bonner v. McPhail*, 31 Barb. 106.

But it is not necessary that the false testimony alleged to have been given should have gone to the whole claim or defense in issue. *Dayton v. Rockwell*, 11 Wend. 140; *Hutchins v. Blood*, 35 Wend. 413.

But it has been held that if the testimony charged to have been perjury was wholly immaterial, or that the part to which perjury related, if it related to part only, was immaterial, the action cannot be maintained. *Wilbur v. Ostrom*, 1 Abb. Pr. (N. S.) 275.

The burden seems to be upon defendant, if he claims the evidence given was irrelevant, to show that fact in defense. *Power v. Price*, 16 Wend. 450; *Jacobs v. Fyler*, 3 Hill, 572. See also *Howard v. Sexton*, 4 N. Y. 157.

In *Spooner v. Keeler*, 51 N. Y. 527, this subject is considered by Lot, Ch. C., and Reynolds, C. In the opinion of the latter it is said that, "although the complaint alleged pendency of the suit between the parties before a justice of the peace, and that the words were spoken in reference to evidence on the trial of that issue which was material to the result, the plaintiff was not bound to prove it; to show that it was immaterial, rested with the defendant." *Jacobs v. Fyler*, 3 Hill, 572.

The following words have been held to be actionable: "You have perjured yourself as overseer." *Hopkins v. Beedle*, 1 Cai. 347.

"You have sworn to a lie knowingly, for which you stand indicted." *Pelton v. Ward*, 3 Cai. 73.

Saying of a witness giving material testimony in an action "that is false." *McClaghry v. Wetmore*, 6 Johns. 82; *Hutchins v. Blood*, 25 Wend. 413.

To charge plaintiff with having sworn "falsely," adding a threat "to attend the grand jury about it." *Gilman v. Lowell*, 8 Wend. 573.

To say "S. has sworn falsely and you can go to Squire B.'s and see it in the suit," etc. *Sherwood v. Chace*, 11 Wend. 38.

When defendants, speaking of the affidavit made by plaintiff, specifying the allegation which he deemed false, said that "plain-

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tiff perjured himself," it appearing that the affidavit was substantially, but not literally, true, it was held that it was properly left to the jury to show in what sense the words were used. *Cook v. Bostwick*, 12 Wend. 48.

It has been held that the words "you have sworn false under oath, you have lied under oath," etc.; did not import a charge of perjury. *Phincle v. Vaughan*, 12 Barb. 215. But this seems to have been rather a question of pleading than of the substantive law.

The words "your boy stole my corn," have been held actionable. *Maybee v. Fisk*, 42 Barb. 326. So have the words "he swindled and robbed me." *Slayton v. Hemken*, 91 Hun, 582, 36 N. Y. Supp. 249.

Defendant accusing plaintiff in the presence of others of theft, — *Held* actionable *per se*. *Maeske v. Smith*, 35 St. Rep. 541, 12 N. Y. Supp. 423.

The words "he is a thief," — *Held* slanderous. *McGibbon v. Young*, 20 Week. Dig. 12.

But as to the words "You are a thief, you stole hoop-poles from B.'s land," properly left to the jury to determine whether defendant intended to charge plaintiff with taking poles already cut, which would be a felony, or only to charge with cutting down and carrying away timber to make hoop-poles, which would only amount to a charge of trespass. *Dexter v. Tabor*, 12 Johns. 239.

To charge a person with "removing a land mark," is actionable, that offense being indictable and involving moral turpitude. *Young v. Miller*, 3 Hill, 21.

To charge a woman with keeping a bawdy-house or a whorehouse, is actionable. *Martin v. Stilwell*, 13 Johns. 275; *Wright v. Paige*, 36 Barb. 438.

So are the words "the people upstairs keep a whorehouse." *Cook v. Rief*, 52 N. Y. Super. 302.

The statement concerning plaintiff that "he was father of a child by a girl not yet 15 years old," — *Held* slanderous. *Dudley v. Nowill*, 11 App. Div. 203, 42 N. Y. Supp. 681.

To charge a man with having applied to defendant to "make away with a bastard child, of which he is the father," is actionable. *Demarest v. Haring*, 6 Cow. 76.

So as to a charge to destroy human life by administering medicines, with full knowledge of the deleterious effects. *Marsh v. Davison*, 9 Pai. 580.

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To say of a woman, "She took medicine to get rid of the child she was like to have; she did kill the child she was like to have." *Widrig v. Oyer*, 13 Johns. 124.

An allegation that one has killed a human being is actionable in itself. *Carroll v. White*, 33 Barb. 615.

So to charge a man with having criminal intercourse with a woman, and having aided her in securing an abortion. *Bissell v. Cornell*, 24 Wend. 354.

So of a charge of blackmailing. *Robertson v. Bennett*, 44 N. Y. Super. 66.

The charge of having scuttled a ship to get the insurance is actionable. *McGibbon v. Young*, 20 Week. Dig. 12.

To call one a "dealer in counterfeit money." *Pike v. Van Wormer*, 6 How. Pr. 99. But not to charge one with having "passed counterfeit money." *Pike v. Van Wormer*, 5 How. Pr. 171.

Nor to call one a "bogus pedler." *Pike v. Van Wormer*, *supra*.

To charge one with having burnt his building, with having intent to defraud his insurers, is actionable. *Case v. Buckley*, 15 Wend. 327.

So also as to the charge of arson, and evidence on the trial. *Warner v. Southall*, 31 App. Div. 375, 52 N. Y. Supp. 320.

The words "He handed papers to influence or bribe the jury," properly pleaded, are actionable. *Gibbs v. Dewey*, 5 Cow. 503.

Also the words "He altered the note with the view of getting better security," "He altered the note for the purpose of binding me to pay it." *Harmon v. Carrington*, 8 Wend. 488.

As to whether an action can be maintained for alleging that defendant forged a name to a petition to the legislature, see *Alexander v. Alexander*, 9 Wend. 141.

Words charging plaintiff with selling and disposing of mortgaged chattels are actionable. *Vause v. Middlebrook*, 3 St. Rep. 277.

As is a charge of smuggling goods into the country. *Stilwell v. Barter*, 19 Wend. 487.

The words "He swindled and robbed me" are slanderous *per se* and impute a crime. *Slayton v. Hemken*, 91 Hun, 582, 36 N. Y. Supp. 249, citing *Hays v. Ball*, 72 N. Y. 418; *Phillips v. Barber*, 7 Wend. 439; *Solomon v. Dutton*, 10 Bing. 402; *Tomlinson v. Brittlebank*, 4 B. & A. 630.

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Stating that plaintiff's conduct in a shooting match was a swindle, and that he had swindled before, is not actionable *per se*. *Eislie v. Walther*, 4 N. Y. Supp. 385.

To call a person a swindler and rogue or a scoundrel is not actionable. *Chase v. Whitlock*, 3 Hill, 139; *Quinn v. O'Gara*, 2 E. D. Smith, 388; *Eislie v. Walther*, 4 N. Y. Supp. 385.

## SUBDIVISION 3.

## Words Injurious to Office, Profession, or Trade.

Defamatory words are actionable which directly tend to the prejudice of any one in his profession, trade, or business. *Starkie on Slander*, 117; *Newell*, 168; *Pollard v. Lyon*, 91 U. S. 225.

An imputation of this character to be actionable without special damage must touch the person to whom it is spoken, in his profession, trade, business, or office. *Ringwood*, 162; *Ayre v. Craven*, 2 A. & E. 2.

In *Dole v. Van Rensselaer*, 1 Johns. Cas. 330, it was held that words spoken of a person in relation to his office of sheriff and amounting to a charge of malpractice are actionable.

A very full note is added to this case citing numerous authorities and illustrations of slanderous words spoken of one in his office, profession, or trade.

The principal case was cited upon the point in *Kinney v. Nash*, 3 N. Y. 177 (178), where it is held upon the authority of *Oakley v. Farrington*, 1 Johns. Cas. 129, that it is not enough that the words may tend to injure one in his office or calling, unless they are spoken of him in his official or business character.

The rule is that words not actionable in themselves will not become so by being spoken of one filling an office or carrying on the business unless spoken of him in such official or business capacity. *Van Tassel v. Capron*, 1 Den. 250; *Ireland v. McGarvish*, 3 N. Y. Super. 153; *Harcourt v. Harrison*, 1 Hall, 474.

Any charge of dishonesty against an individual in connection with his business, whereby his character in such business may be injuriously affected, is actionable. *Fowles v. Rowen*, 30 N. Y. 20.

Andrews, J., in *Sanderson v. Caldwell*, 45 N. Y. 398 (405), lays down the rule as derived from the authorities, and with which he says most cases can be reconciled, as follows: "When the words spoken of have such a relation to the profession or occupation of the plaintiff that they directly tend to injure him

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in respect to it, or to impair confidence in his character or ability, when, from the nature of the business, great confidence must necessarily be reposed, they are actionable, although not applied by the speaker to the profession or occupation of the plaintiff; but when they convey only a general imputation upon his character, equally injurious to any one of whom they might be spoken, they are not actionable, unless such application be made."

It is also necessary in order that such words may be actionable to show that the person concerning whom they were uttered was, at the time they were uttered, carrying on his profession, trade, or business, or filling his office. *Ringwood*, 161; *Bellamy v. Burch*, 16 M. & W. 590; *Gallwey v. Marshall*, 9 Exch. 295.

Slander will not lie, for words spoken of the person in the discharge of official duties, if the office has ceased at the time of the speaking of the words. *Forward v. Adams*, 7 Wend. 205, cited with approval, *Cramer v. Riggs*, 17 Wend. 209.

Whatever words have a tendency to hurt or bring ridicule or contempt upon the person, or are calculated to prejudice a man who seeks his livelihood by any trade or business, are actionable when proved to be spoken in relation thereto, and unless the defendant shows a legal excuse, the plaintiff is entitled to recover without allegation or proof of special damage. *Keene v. Tribune Assn.*, 76 Hun, 488, 27 N. Y. Supp. 1045.

The rule that words spoken or written of any persons holding office or engaged in any trade or profession, to be actionable in themselves, must "touch him in his office," is not to be questioned. *Potter v. N. Y. Evening Journal Publishing Co.*, 68 App. Div. 95 (98).

It was held in this case that certain words spoken with regard to a minister were libelous, although not spoken of him in his ministerial or clerical capacity, because they tended to deprive him of his benifice, to subject him to deposition from his office, or to represent him as unfit to fill that office.

Words imputing incontinency of a clergyman are actionable in themselves. *Demarest v. Haring*, 6 Cow. 76, and cases cited.

To render words spoken concerning or relating to a single case or transaction of a person in his profession slanderous *per se*, their plain and natural import must necessarily be to charge gross ignorance or want of skill or integrity in his calling or profession generally. So held where the words were "That the plaintiff did

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it (cut off the arm) to get his name up and get a big fee." *Lynde v. Johnson*, 39 Hun, 12, citing *Folkard's Starkie*, 110; *Southee v. Denny*, 1 Exch. 196; *Foot v. Brown*, 8 Johns. 64; *Fowles v. Bowen*, 30 N. Y. 20.

It was held in *Foot v. Brown*, 8 Johns. 64, that words charging a professional man with want of knowledge or skill in relation to a particular case are not actionable unless upon showing special damage.

In *Cruikshank v. Gordon*, 118 N. Y. 178, it was held that it was unnecessary to consider this question as much of the language complained of in that case related to plaintiff's general competency and fitness to practice as a physician, but the court laid down the general rule that statements made in respect to a practicing physician imputing to him general ignorance of medical science, incompetency to treat diseases, and a general want of professional skill are slanderous and actionable without proof of special damages. Citing *Secor v. Harris*, 18 Barb. 425; *Fitzgerald v. Redfield*, 51 Barb. 484; *Bergold v. Puchta*, 2 T. & C. 532; *Lynde v. Johnson*, 39 Hun, 12.

Where the reflection is not simply upon the character of the plaintiff as a man, but upon his character as a physician, imputing to him want of those qualifications which attract patronage and are essential to his calling, and tends to undermine him in the confidence of the community, it is actionable without proof of special damages. *Krug v. Pitass*, 162 N. Y. 154.

The words, "He is no doctor; he bought his diploma for \$50," spoken of plaintiff in his professional character, are actionable *per se*. *Bergold v. Puchta*, 2 T. & C. 532, holding that it is well-settled law that words published of a physician falsely imputing to him general ignorance or want of skill in his profession are actionable in themselves on the ground of presumed damage.

To say of a physician, although in reference to a particular case, "He killed my children; he gave them teaspoonful doses of calomel and it killed them; they died the same day," is actionable without proof of special damage, since it imputes an act evincing gross ignorance and unskillfulness, such as cannot fail to injure his general reputation and deprive him of general confidence. *Secor v. Harris*, 18 Barb. 425.

To call a physician a "quack" is a fact charging him with want of necessary knowledge and training to practice medicine,

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and is actionable without proof of special damage. *White v. Carroll*, 42 N. Y. 162.

The question is fully considered in *Mattice v. Wilcox*, 147 N. Y. 624, and it was held that a publication which in effect charges an attorney-at-law with incapacity to perform the ordinary duties of his profession in a given class of actions, as, for example, incapacity to defend actions for negligence brought against a municipal corporation, in regard to which he has held himself out as capable of accepting employment, is equivalent to a general charge of incapacity in his profession and as libelous *per se* without allegation or proof of special damages. Citing *Moore v. Francis*, 121 N. Y. 199.

In *Garr v. Selden*, 6 Barb. 416, it is held that to impute to a professional man ignorance or want of skill in a particular transaction is not actionable; that to be actionable, words of that character must be spoken or written of him generally; and further, that words imputing to a lawyer a want of integrity, whether they are used generally of his profession, or as to some one transaction, are actionable. *Held*, actionable to charge an attorney with the revealing and disclosing confidential communications made to him by his client, and for the purpose of aiding and abetting another person with whom he has combined and colluded and of injuring his client. Reversed on appeal, 4 N. Y. 91, upon the ground that the statement was privileged.

Where it is evident from the face of the complaint that the words were spoken of and concerning plaintiff's trade a cause of action is set out, although the words did not mention the trade or business of plaintiff. *Fitzgerald v. Geils*, 84 Hun, 295, 32 N. Y. Supp. 306.

Words spoken of a hotel-keeper in his business stating that he kept no accommodations, and that a person could not get a decent meal or a decent bed if he tried, are actionable *per se*. *Trimmer v. Hiscock*, 27 Hun, 364, citing *Burtch v. Nickerson*, 17 Johns. 217; *Fitzgerald v. Redfield*, 51 Barb. 484; *Ireland v. McGarvish*, 1 Sandf. 155.

A charge against a merchant that he is dishonest and has been in the habit of filling at his store an oil can containing only five gallons and charging the customer for six gallons. *White v. Chestro*, 16 Week. Dig. 186.

A statement of one who is engaged in dealing in and racing

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horses, "He is no sportsman and had to leave a city on account of a turf fraud," is actionable *per se*, as it tends to injure him in his business. *Gideon v. Dwyer*, 87 Hun, 246, 33 N. Y. Supp. 754.

A false statement that a defendant had a claim upon plaintiff's place of business, and that if a certain brewer sold beer to plaintiff, defendant would, under his agreement with plaintiff, hold that person liable for its claim against the plaintiff, is actionable. *Ryan v. Burger & Hoover Brewing Co.*, 37 St. Rep. 287, 13 N. Y. Supp. 660.

An allegation that defendant published in regard to plaintiff that plaintiff's services had been dispensed with, that the reason for the change was the careless manner of attending to business, and that his place and that of others would be filled with competent parties who would attend to the affairs in a more business-like manner, states words to injure plaintiff in his business. *Ratzel v. N. Y. News Publishing Co.*, 35 Misc. Rep. 487, 71 N. Y. Supp. 1074.

But an allegation that defendant furnished a customer with a domestic article instead of an imported one ordered by him, and in explanation told such customer, also a customer of plaintiff, that plaintiff had said it made no difference about the imported cabinet, to send the customer a domestic one, and plaintiff would make everything all right with him, is bad on demurrer. The language is not libelous *per se*. *Verbeck v. Duryea*, 36 Misc. Rep. 242, 73 N. Y. Supp. 346.

Words imputing to a mechanic want of skill or knowledge in his craft are actionable *per se*, if they are clearly shown to have been spoken with reference to his occupation, and if the employment is one requiring peculiar knowledge and skill. *Fitzgerald v. Redfield*, 51 Barb. 484.

To say of a merchant, "You keep false books," is actionable as calculated to injure his credit. As are like words with regard to a blacksmith. *Backus v. Richardson*, 5 Johns. 476; *Burtch v. Nickerson*, 17 Johns. 217, citing *Feise v. Linden*, 3 Bos. & P. 372.

In 17 Johns. 217, earlier English authorities are cited to the same effect. *Loomis v. Swick*, 3 Wend. 205; *Sewall v. Catlin*, 3 Wend. 291; *Mott v. Comstock*, 7 Cow. 654; *Ostrom v. Calkins*, 5 Wend. 263; *Tobias v. Harland*, 4 Wend. 537.



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It is not actionable to charge a man with keeping false books of account unless the keeping of books is an incident to his business. *Rathbun v. Emigh*, 6 Wend. 407.

Words imputing insolvency of a person, although not a merchant, to whom credit is given, are actionable. *Carpenter v. Dennis*, 3 Sandf. 305.

Words spoken of a merchant importing that he is unable to pay his debts, as "Poor H., it is hard for him to lose his debt," held actionable. *Mott v. Comstock*, 7 Cow. 654.

So also the words, "I understand there is trouble with S.," spoken of a merchant, held actionable as implying want of credit or responsibility. *Sewall v. Catlin*, 3 Wend. 291.

Words spoken of a drover, "He is not good for the debt; I doubt whether you ever see him again," were held proper to be sent to the jury to determine whether they implied insolvency. *Calkins v. Wheaton*, 1 Edm. 226.

The words, "There is a time when men fail who must fail, and O.'s time has come," are actionable as imputing insolvency. *Ostrom v. Calkins*, 5 Wend. 263.

Words imputing insolvency are actionable. *Ostrom v. Calkins*, 5 Wend. 263; *Fry v. Bennett*, 28 N. Y. 324.

Words spoken or published of a party as a merchant or tradesman in relation to the solvency, to be actionable, must in their common acceptation imply a want of credit or responsibility. *Lewis v. Chapman*, 16 N. Y. 369 (375).

But a statement by an auctioneer in refusing to accept plaintiff's bid, that he was irresponsible, is not actionable, unless express malice is shown. *Green v. Meyer*, 78 St. Rep. 81, 44 N. Y. Supp. 81.

A charge that plaintiff "is a drunkard," and by reason of his drunkenness he is no good any more "as a mechanic," is actionable. *Fitzgerald v. Geils*, 84 Hun, 295, 32 N. Y. Supp. 306.

To say of a brick mason that "he is no mechanic; he could not make a good wall, or do a good job of plastering; he is no workman, and that he is a botch," is actionable. *Fitzgerald v. Redfield*, 51 Barb. 484.

Words to be actionable must impute fault to the plaintiff himself, not to the article in which he deals. Thus, to say of a watchmaker that "his watches are bad," imputes a fault to the article

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in which he deals, and are not slanderous words as to the plaintiff. *Tobias v. Harland*, 4 Wend. 537.

A statement that a person is afraid to go to the house of plaintiff alone, stating that he is a desperate, dangerous man, is not actionable, although spoken of the keeper of a public house. *Ireland v. McGarvish*, 1 Sandf. 155.

See "Slander of Title" and "Libel upon Business," art. XV.

## SUBDIVISION 4.

## Words Imputing a Contagious Disease.

Words which impute that a party is affected with a contagious disease, which would exclude him from society, are actionable in themselves, without proof of special damage. Newell (p. 198) states that leprosy and the venereal diseases are the only diseases included in this category. This is also the rule laid down in Starkie, p. 113; *Pollard v. Lyon*, 91 U. S. 225 (226).

To falsely publish that a man has leprosy is actionable *per se*. *Simpson v. Press Publishing Co.*, 30 Misc. Rep. 228, 67 N. Y. Supp. 401.

Am. & Eng. Encyc. of Law, vol. 18, p. 932, includes the plague as one of the diseases of this character. As does Fraser (p. 29), citing *Taylor v. Perkins*, Cro. Jac. 144; Rolle's Abridgment, 44; *Villers v. Mousley*, 2 Wils. 403; *Bloodworth v. Grey*, 7 McGr. 334, as illustrations of the diseases included in the general definition.

The rule has been applied in this State in *Williams v. Holledge*, 22 Barb. 396, where it was said of a woman: "She has the venereal disease." In *Hewit v. Mason*, 24 How. Pr. 366, it was held that the words "Nothing ails him but the pox; he is rotten with it; he got it," etc., were actionable.

But such an allegation used in the past tense is not actionable, since the words must impute a present continuance of the disease. *Carlsake v. Mapledoram*, 2 T. R. 473; *Pike v. Van Wormer*, 5 How. Pr. 171; *Smith v. Cook*, 1 Alb. L. J. 162. It was held in *Upton v. Upton*, 51 Hun, 184, 4 N. Y. Supp. 936, that the words: "The plaintiff had a bad disease," does not necessarily impute a venereal disease. It was further held that it was not an imputation of want of chastity.

Newell, in closing the discussion of the subject, says that in respect to the terms in which the imputation is conveyed, they

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may either expressly impute the disease or by the aid of collateral circumstances render the implication unavoidable.

## SUBDIVISION 5.

## Words Imputing Unchastity.

At common law, words imputing unchastity or adultery to a woman, married or unmarried, were not actionable unless proof was made of special damage. *Newell*, 163; 18 Am. & Eng. Encyc. of Law, 932; *Brooker v. Coffin*, 5 Johns. 188; *Buys v. Gillespie*, 2 Johns. 115; *Bradt v. Towsley*, 13 Wend. 253; *William v. Hill*, 19 Johns. 305; *Anonymous*, 60 N. Y. 262; *Terwilliger v. Wands*, 17 N. Y. 54.

In *Erwin v. Dezell*, 64 Hun, 391, 19 N. Y. Supp. 784, it was held that words alleging that plaintiff had been arrested for bastardy and paid a sum to settle the matter were not actionable *per se*, the words not being spoken of the plaintiff in regard to his vocation or daily life.

This rule has been changed by section 1906 of the Code of Civil Procedure, so far as slander of a woman is concerned. The section is a re-enactment of chapter 219, Laws of 1871, and provides:

"In an action of slander, brought by a woman, for words imputing unchastity to her, it is not necessary to allege or prove special damages. If the plaintiff is married, the damages recovered are her separate property."

Under the decisions in this State, it has been held that unchastity in a woman means that she has had unlawful sexual intercourse, or is guilty of such conduct as would tend to indicate that she was ready and willing to submit to the unlawful embraces of a man. *Mason v. Stratton*, 17 St. Rep. 302, 1 N. Y. Supp. 511. This case also holds that language imputing acts, from which unchastity is to be inferred, is actionable.

In *Courtney v. Mannheim*, 39 St. Rep. 125, 14 N. Y. Supp. 929, it was held that the words, "You are an Irish whore," are slanderous under the statute.

The words "Those people up stairs keep a whorehouse," gives a cause of action to one showing himself to be one of those people up stairs. *Cook v. Reif*, 52 N. Y. Super. 252.

But the words: "Go over to my office; my wife and my mother are particular what company they keep; they do not wish to be

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annoyed by people of such character as you," spoken to a woman, do not necessarily imply want of chastity. *McMahon v. Hallock*, 1 N. Y. Supp. 312, 15 St. Rep. 828.

Calling the plaintiff a "God-damned Irish bitch" was held not necessarily to impute want of chastity. *Nealon v. Frisbie*, 11 Misc. Rep. 12, 31 N. Y. Supp. 856, citing *Philips v. Baldwin*, 8 Week. Dig. 194; *McMahon v. Hallock*, 15 St. Rep. 828, 1 N. Y. Supp. 312. The court holds, per McAdam, J., that these words do not, upon their face, convey a slanderous imputation, and that there must be a colloquium connected with the words spoken, and an innuendo showing the injurious sense in which they were uttered. The case seems to be decided substantially upon the insufficiency of the pleading rather than as a determination that the words are not slanderous when accompanied by proper allegation.

The words: "What are you? You are working in Mike Bryan's low hotel; any one that worked there ain't much, and I can prove it; and I dare you to have me arrested," — *Held*, not actionable without an averment of special damage. *Brown v. Moore*, 90 Hun, 169, 35 N. Y. Supp. 736.

A pleading in an action for slander charging the defendant with saying the plaintiff "was in the habit of entertaining gentlemen callers at all hours of the night" is not sufficient without innuendo or allegation as to the sense in which the words were used. *Hemmens v. Nelson*, 138 N. Y. 517.

In *Distin v. Rose*, 69 N. Y. 122, it was held that under chapter 219, Laws 1871, the plaintiff is not confined to proof of the charge stated in the complaint, but evidence is competent of words spoken by defendant at any time before the commencement of the action repeating substantially the same charge.

In *Butterfield v. Bennett*, 18 N. Y. Supp. 432, it was *held* that in an action under this section the defendant cannot have an order for bill of particulars showing the names of persons who have shunned the plaintiff in consequence of the publication, but that the defendant is entitled to know the plaintiff's true address in order to fully investigate her antecedents in case he wishes to set up justification.

Statements made by a resident of a school district, having a daughter attending school, to the trustees of the district as to the character of a female teacher, if the defendant had no reason to be-

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lieve the statement to be true, is evidence of malice and will render him liable. *Harwood v. Keech*, 4 Hun, 389.

The statement that a woman "caused her barkeeper to stay with her all night" does not necessarily impute unchastity. *Taylor v. Wallace*, 31 Misc. Rep. 393, 64 N. Y. Supp. 271.

A complaint alleging that defendant charged a married woman with having communicated to her husband a loathsome disease through the marital relation is not demurrable as failing to state facts constituting a cause of action, and it will be left to the jury to say, upon the evidence, whether the words impute unchastity. If they find that they do, the facts will bring the case within section 1906, authorizing an action without allegation of special damage. *Woodruff v. Woodruff*, 36 Misc. Rep. 15, 72 N. Y. Supp. 39.

## ARTICLE V.

## LIBEL.

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## SUBDIVISION 1.

## Definition, Criminal Libel Distinguished.

An action for libel is not limited to special grounds or by the necessity of proving special damage. It may be founded on any statement which disparages a man's private or professional character or which tends to hold him up to hatred, contempt, or ridicule. *Encyclopaedia Britannica* (article Libel), p. 505.

Holt, in his *Law of Libel*, says: "Everything written of another, which holds him up to scorn and ridicule, that might reasonably be considered as provoking him to a breach of the peace, is a libel." And again, "All such written abuse as may fairly be intended to impair him in the enjoyment of society, or throw a contempt upon him which might affect his general fortune and comfort, is a positive injury, and therefore the subject of an action on the case."

With regard to that species of defamation which is effected by writing or printing, or by pictures and signs, and which is

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technically denominated *libel*, although in general the rules applicable to it are the same which apply to verbal slander, yet in other respects it is treated with a sterner rigor than the latter; because it must have been effected with coolness and deliberation, and must be more permanent and extensive in its operation than words, which are frequently the offspring of sudden gusts of passion, and soon may be buried in oblivion. *Rex v. Beau*, 1 Ld. Raym. 414. It follows therefore that actions may be maintained for defamatory words published in writing or in print, which would not have been actionable if spoken. Thus, to publish of a man in writing, that he had the itch and smelt of brimstone, has been held to be a libel. Per Wilmot, C. J., in *Villers v. Mousley*, 2 Wils. 403. In *Cropp v. Tilney*, 3 Salk. 225, Holt. Ch. J., thus lays down the law: "That scandalous matter is not necessary to make a libel; it is enough if the defendant induce a bad opinion to be had of the plaintiff, or make him contemptible or ridiculous." And Bayley, J., declares in *McGregor v. Thwaites*, 3 Barn. & Cres. 33, that "an action is maintainable for slander either written or printed, provided the tendency of it be to bring a man into hatred, contempt, or ridicule." To the same effect are the decisions in 6 Bing. 409, *The Archbishop v. Robeson*; and in 4 Taunt. 355, *Thorley v. The Earl of Kerry*; *White v. Nicholls*, 3 How. (U. S.) 286.

Defamatory words, falsely spoken of a person, which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment, are actionable in themselves without proof of special damages; and so, too, are defamatory words falsely spoken of a party, which prejudice such party in his or her profession or trade. Words are actionable which directly tend to the prejudice of any one in his office, profession, trade, or business. Newell on Slander and Libel, 168, citing Starkie on Slander, 117; *Pollard v. Lyon*, 91 U. S. 225.

"Libel, in its legal sense, may be defined as a false and malicious defamation of character, expressed in writing, print, picture, or the like, tending to injure the reputation of another, and whereby that other is exposed to public ridicule, hatred, or contempt." Moak's Underhill on Torts, p. 119, citing Broom's Maxims, 731.

In libel, as in slander, defamatory publications are classified

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as publications actionable *per se*, and publications actionable on averment and proof of special damage. In the first class are embraced all cases of publications which would be actionable *per se*, if made orally. These cases therefore require no further attention. It also embraces all other cases where the additional gravity imparted to the charge by the publication can fairly be supposed to make it damaging. Any false and malicious writing published of another is libelous *per se*, when its tendency is to render him contemptible or ridiculous in public estimation, or expose him to public hatred or contempt, or hinder virtuous men from associating with him. "The nature of the charge," it is said in one case, "must be such, the court can legally presume the plaintiff has been degraded in the estimation of his acquaintances, or of the public, or has suffered some other loss, either in his property, character, or business, or in his domestic or social relations in consequence of the publication." Cooley on Torts, 240, citing *Cropp v. Tilney*, 3 Salk. 226; *Anson v. Stewart*, 1 T. R. 748; *Thomas v. Croswell*, 7 Johns. 264; *Stone v. Cooper*, 2 Den. 299.

That which is a slander, if spoken, is a libel, if written or printed. The definition of libel embraces all slanders, if written or printed, but much else. Any written or printed words which (1) expose one to hatred, contempt, ridicule, or obloquy, or (2) which tend to injure one in his profession or trade, or (3) cause one to be shunned or avoided by his neighbors, is a libel *per se*. Odgers, 21 (63), cited in *Rade v. Press Publishing Co.*, 37 Misc. Rep. 255.

In this case the definition of a libel is considered and discussed at considerable length, citing authorities, among others, *People v. Croswell*, 3 Johns. Cas. 354; *Steel v. Southwick*, 9 Johns. 215; *Riggs v. Denniston*, 3 Johns. Cas. 205, together with English authorities, and definition from Blackstone's Commentaries.

Defamatory words are deemed actionable *per se*, only where the necessary or natural and proximate consequence of their utterance would be to cause injury, and damages may be presumed. Cooley on Torts (2d ed.), 228. Odgers in his work on Libel and Slander (3d ed.), 59, says: "Words which are clearly defamatory when written and published may not be actionable when merely spoken. \* \* \* Spoken defamatory words are actionable whenever special damage has in fact resulted from their use. They are also actionable when the imputation cast by them

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on the plaintiff is on the face of it so injurious that the court will presume, without any proof, that his reputation has been thereby impaired." In *Newell on Slander and Libel* (2d ed.), 181, it is stated that "the real practical way by which to determine whether special damage must be alleged and proven in order to make out a cause of action for defamation is whether the language is such as necessarily must or naturally and presumably will occasion pecuniary damage to the person of whom it is spoken." Starkie (*Folkard's Starkie on Slander and Libel*, § 11) says: "The ground of an action for words, in the absence of specific damage, is the immediate tendency of the words themselves to produce damage to the person of whom they are spoken; in which case presumption supplies the place of absolute proof." *Le Massena v. Storm*, 62 App. Div. 150 (153), 70 N. Y. Supp. 882.

In *Byrnes v. Mathews*, 12 St. Rep. 74 (79), it is said: "Judges and text-book writers furnish plentiful definitions of what constitutes a libel with varying shades of difference; they all agree that a malicious publication tending to expose a person to ridicule, contempt, hatred, degradation of character, is libelous." Citing *Addison on Torts*, 309; *Bergmann v. Jones*, 94 N. Y. 51 (64).

The opinions in the principal case discuss very fully the question as to what words are libelous, and under what circumstances an action will lie therefor. Citing text-writers and authorities in this country and England.

In *Moore v. Francis*, 121 N. Y. 199, it is held that written words are libelous in all cases where, if spoken, they would be actionable, and may be libelous when they would not support an action for slander. The court, per Andrews, J., discusses the question as to what constitutes libel and slander. It is said: "The word 'libel,' as expounded in the cases, is not limited to written or printed words, which defame a man, in the ordinary sense, or which impute blame or moral turpitude, or which criticise or censure him."

In *Morey v. Morning Journal Assn.*, 123 N. Y. 207, per Earl, J., it is held that there can be no doubt that a publication is libelous *per se*, the tendency of which is to disgrace plaintiff and bring him into ridicule and contempt. Citing elementary works and English and American authorities; among them *Shelby v. Sun Printing Assn.*, 38 Hun, 474, the opinion in which quotes, with approval, the definition of libel given by Starkie, as follows: "In short an action lies for any false, malicious, and



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personal implication tending to alter a party's station in society for the worse, by imputing to him either bad actions or vicious principles, or which diminish his respectability and abridge his comforts by exposing him to disgrace and ridicule; and this without proof of special damages."

The publication of a libel is a wrongful act, presumably injurious to those persons to whom it relates, and in the absence of legal excuse gives a right of recovery irrespective of the intent of the defendant who published it, and this, although he had reason to believe the statement to be true, and was actuated by an honest or even commendable motive in making the publication. *Holmes v. Jones*, 147 N. Y. 59.

Words which tend to diminish the respectability of the person to whom they relate, and to expose him to disgrace and obloquy, although they do not impute the commission of a crime, and would not be actionable *per se* if merely spoken, are, when printed and published, libelous and actionable, although no special damages are alleged or proved. *Winchell v. Argus Co.*, 69 Hun, 354, 23 N. Y. Supp. 650, cited *D'Andrea v. New York Press Co.*, 61 App. Div. 605 (607), 70 N. Y. Supp. 759, with *More v. Bennett*, 48 N. Y. 472, and *Shelby v. Sun Printing Assn.*, 38 Hun, 474.

The test as to whether an article published is libelous is "whether, to the mind of an intelligent man, the tenor of the article and the language used naturally import a criminal or disgraceful charge." *More v. Bennett*, 48 N. Y. 472, cited in 61 App. Div. 607.

An article is libelous which is calculated to disgrace one and hold him up to ridicule and contempt without proof of special damages. *Gates v. N. Y. Recorder Co.*, 155 N. Y. 228 (232).

See further as to distinction between libel and slander, art. I, this chapter.

Section 242 of the Penal Code defines a libel as follows: "A malicious publication, by writing, printing, picture, effigy, sign, or otherwise than by mere speech, which exposes any living person, or the memory of any person deceased, to hatred, contempt, ridicule, or obloquy, or which causes or tends to cause any person to be shunned or avoided, or which has a tendency to injure any person, corporation or association in his or their business or occupation, is a libel."

It will be noted that this definition relates to a criminal libel, and is perhaps not strictly accurate as a definition of libel in a

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civil action. Bishop on Noncontract Law, p. 117, in a note, criticises very sharply the definition of a libel given in *Steele v. Southwick*, 9 Johns. 214, and repeated in 1 Den. 359, so far as it defines a libel as affecting the reputation of the dead upon the ground that this relates entirely to criminal prosecution. He says, referring to the adoption of this definition in civil cases, that the "learned court, without any thought of the distinction between an indictment and an action of tort, proceeds to apply this criminal definition to the civil case in hand. Possibly if the civil suit had happened to be, as it was not, one by a dead man for a reproach cast upon his memory, the judges would have looked upon the definition as a little mixed, and inquired whether there was not here, after all, a distinction."

Bishop cites in the same note, as a correct definition of libel, one adopted in Massachusetts from a note to *Craft v. Boite*, 1 Saund. (Wms. Ed.) 246b, 248: "To write or publish anything of another, which either makes him ridiculous, or holds him out as a dishonest man, is held to be actionable, when the speaking of the same words would not be."

In *Clark v. Anderson*, 11 N. Y. Supp. 729, however, the definition of a libel from the Penal Code, § 242, is cited. The court says of the question then at bar: "Measured by this standard it does not seem possible to escape the conclusion that the question should have been at least submitted to the jury, whether the effect of the language was such as to bring it within the purview of the statute."

In *McFadden v. Morning Journal Assn.*, 28 App. Div. 508 (515), 51 N. Y. Supp. 275, the definition of libel from the Penal Code seems to be adopted as appropriate in a civil action.

It would seem from the language of the court, in *Schoepflin v. Coffee*, 162 N. Y. 12 (20), that it is more than doubtful whether the provisions of section 254a of the Penal Code, making it a misdemeanor to deliver a libelous article to an editor, states ground for civil action.

## SUBDIVISION 2.

## Words Imputing Crime.

A charge that a person was guilty of perjury in answering questions concerning his character as a juror is libelous. *Rosenberg v. Nesbit*, 14 St. Rep. 248.

Statement that persons employed in a certain department

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"have been dismissed for alleged theft of leather belonging to the department," is libelous as amounting to a charge of theft. *Dwyer v. Fireman's Journal Co.*, 11 Daly, 248.

The publication of a charge that a notary certified the acknowledgment of ten persons as having been taken by him to a bond, and that the persons purporting to sign it did not know that their names were in the bonds, constituted a libel. *Henderson v. Commercial Advertiser Co.*, 46 Hun, 504.

A charge that plaintiff had been paid a sum in cash for procuring the appointment of an official and that large sums had been paid him for other lucrative offices is libelous *per se*. *Weed v. Foster*, 11 Barb. 203.

The words, "Our army swore terribly in Flanders, said Uncle Toby; and if Toby was here now, he might say the same of some modern swearers." "The man (meaning plaintiff) is no slouch at swearing to an old story," held libelous, either as holding plaintiff up to contempt and ridicule, or as being so false or criminal as to be regardless of the obligations of a witness and unworthy of belief. *Steele v. Southwick*, 9 Johns. 214.

A newspaper article which does not refer to any judicial proceeding but recites the circumstances of an unprovoked assault, resulting in death, alleged to have been committed by plaintiff, and the effect thereof upon the family of the deceased, is libelous upon its face. *Jesper v. Press Publishing Co.*, 76 Hun, 64, 27 N. Y. Supp. 619, 59 St. Rep. 607, affirmed 149 N. Y. 612.

An article stating that plaintiff "has left the city with \$8,500 of the Southern Bank's money;" that he "left Savannah on Sunday night, and it is supposed went to New York," is libelous *per se*, and innuendo explaining its meaning and application is not necessary. If one were necessary, the innuendo, that by reason of the publication plaintiff has been "held up to the public, his business acquaintances and friends as a thief and a dishonest and untrustworthy man," is sufficient. *Turton v. N. Y. Recorder Co.*, 144 N. Y. 144.

Where a complaint alleged that defendant maliciously spoke of and concerning the plaintiff, etc., the words: "Charles Keller set fire to my barn, I will never let Keller get the insurance on his lot of tobacco, God damn him; he set my building afire, and I have a witness right here in the room who will swear to it, that he set it afire," states a cause of action, although it contains no

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innuendo or averment that the defendant thereby intended to charge the plaintiff with the commission of the crime, or that the words were so understood. *Keller v. Dean*, 57 App. Div. 7, 67 N. Y. Supp. 842, citing numerous authorities.

Charging a corporation engaged in collecting news and furnishing it to newspapers, with obtaining such news by tapping the telegraph wires used by a rival corporation, is libelous *per se*. *Union Associated Press v. Heath*, 49 App. Div. 247, 63 N. Y. Supp. 96.

An article charging a justice of the peace with committing an assault upon a prisoner arraigned before him, after the prisoner had started to leave the courtroom and had treated the justice with derision, is libelous *per se*. *O'Leary v. N. Y. News Pub. Co.*, 51 App. Div. 2, 64 N. Y. Supp. 327.

A statement that a health board of inspectors found tainted poultry in a butcher shop is not libelous *per se*, as charging the butcher with a misdemeanor in keeping tainted or spoiled food for sale. *Hartmann v. Sun Printing & Pub. Assn.*, 74 App. Div. 282, 77 N. Y. Supp. 538.

See further cases under Slander, art. IV, subd. 2. All slander would be a libel if printed.

## SUBDIVISION 3.

## Words Injuring One in Office.

An early and leading case upon the law of libel upon a public officer is *King v. Root*, 4 Wend. 114, where the libelous article charged that Lieutenant-Governor Root was intoxicated while presiding in the senate. It was held that a publication by a newspaper, affecting the character of a candidate for public office, was not privileged so as to relieve the publishers from the necessity of proving the truth of the charges made. That it did not cast the burden of proof upon the party slandered of showing actual malice or a knowledge of the falsity of the charge. That newspapers are responsible for the truth of their publications, and that belief in the truth of charges contained in the publication does not destroy the presumption of malice.

The following words have been held libelous when spoken with regard to public officers, namely, of a commissioner of bankruptcy, that he is "a misanthropist and violent person, one stripping un-

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fortunate debtors of every cent and then depriving them of the benefit of the act." *Riggs v. Denniston*, 3 Johns. Cas. 198.

Publishing of plaintiff, that "he was prominent in the corrupt legislation of last winter." *Littlejohn v. Greeley*, 13 Abb. Pr. 41.

To charge public officer with "blackmailing" and assert that he has been dismissed for that cause. *Edsall v. Briggs*, 17 Abb. 221, approved *Robertson v. Bennett*, 44 N. Y. Super. 66.

Of a member of congress, that "he is a fawning sycophant, a misrepresentative in congress, and a grovelling office seeker; that he has abandoned his post in congress in pursuit of an office." *Thomas v. Crosswell*, 7 Johns. 264.

An action may be maintained upon a libel charging a party with corrupt conduct in public office, notwithstanding plaintiff's term of office had expired before the publication of the libel. *Cramer v. Riggs*, 17 Wend. 209, distinguishing *Forward v. Adams*, 7 Wend. 204, where it was held that slander would not lie for words spoken of a person in discharge of official duties, if the office had ceased at the time of the speaking of the words.

To charge that plaintiff had entered into a corrupt agreement to the injury of the public interests, and in effect that if elected to the senate he would use his influence to defeat a public improvement for his own aggrandizement or to gratify individual malice. *Powers v. Dubois*, 17 Wend. 63.

Embezzlement from a national bank being exclusively cognizable in the United States court does not render the person guilty of it liable to arrest by village chief of police, as for a felony, and such officer cannot sustain an action for libel against a newspaper, stating that he allowed said person to depart from the village on the ground that he was charged with having connived at an escape. *Westbrook v. N. Y. Sun Assn.*, 58 App. Div. 562, 69 N. Y. Supp. 266.

A publication that a coroner had held an inquest on a live man, supposing him to be dead, and that the man would have been pronounced dead and buried alive, if a physician had not arrived, is libelous *per se*, where the coroner was a physician. *Purdy v. Rochester Printing Co.*, 26 Hun, 206.

Reversed on the ground that the article was not susceptible of any construction which would make the words actionable, as they only referred to plaintiff in his official capacity, and simply ex-

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hibited a prompt and efficient performance of his duty in that capacity. 96 N. Y. 372, citing *Oakley v. Farrington*, 1 Johns. Cas. 130; *Van Tassel v. Capron*, 1 Den. 250, holding that the plaintiff was not spoken of as a physician and not described as acting as such on the occasion in question.

An article charging plaintiff with administering his office for unlawful purposes, of being a corrupt character, and ready and willing to continue and repeat a similar maladministration, is libelous. *McIntyre v. Journal Assn.*, 5 App. Div. 609, 40 N. Y. Supp. 1005.

A publication charging a justice of the peace with having assaulted a prisoner arraigned before him, because the prisoner treated him with derision, and started to leave the courtroom, touches the justice in both his individual and official character, and is libelous *per se*. *O'Leary v. N. Y. News Pub. Co.*, 51 App. Div. 2, 64 N. Y. Supp. 327.

A newspaper making charge of maladministration of a public office is libelous *per se*, and the complaint alleging such publication is not defective because without an innuendo. *Collis v. Press Publishing Co.*, 68 App. Div. 38, 74 N. Y. Supp. 78.

An attorney who makes a charge of corruption against a judicial officer in his own court, while sitting in a case which he is investigating, is guilty of unprofessional and improper conduct, and where he gives no sign of regret, nor retracts, apologizes, or states anything in extenuation or mitigation of his conduct, when given an opportunity to do so, his disbarment is proper. *Matter of Murray*, 33 St. Rep. 831, 11 N. Y. Supp. 336, citing *Bradley v. Fisher*, 13 Wall. 355.

Compare cases under Slander, art. IV, subd. 3. Slanderous words would be libelous if printed. Compare also cases under following subd. 4, Words Injuring One in Profession or Business.

## SUBDIVISION 4.

## Words Injuring One in Profession or Business.

Whatever words have a tendency to bring ridicule or contempt upon a person, or are calculated to prejudice a man in his trade or business, are actionable when proved to have been spoken in relation thereto; and unless defendant shows a lawful excuse,

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plaintiff is entitled to recover without allegation or proof of special damages. *Keene v. Tribune Assn.*, 76 Hun, 488, 27 N. Y. Supp. 1045.

In slander, where the words used have such a relation to the profession or occupation of the plaintiff that they tend directly to injure him in respect to it, or to impair confidence in his character or ability, when, from the nature of his business, great confidence must necessarily be reposed, they are actionable although not applied by the speaker to the profession or occupation of the plaintiff. When, however, they convey only a general imputation upon his character, equally injurious to any one of whom they might be spoken, they are not actionable, unless such application is made. But, in an action for libel, the fact that the words used had reference to the profession or business of the plaintiff is not the substantive ground of the action; the actionable quality of the words used does not, in any case, depend upon that consideration. *Sanderson v. Caldwell*, 45 N. Y. 398.

An article charging plaintiff with want of professional ability and integrity is libelous upon its face. Where the reflection was not simply on the character of the plaintiff as a man, but on his character as a physician, imputing a want of those qualifications which attract patronage and are essential to his calling, it tends to undermine him in the confidence of the community; such an article is actionable without proof of any damage, for the law imputes malice to the defendant and assumes that damage was sustained by the plaintiff from the pure act of publication. *Krug v. Pitass*, 162 N. Y. 154.

A publication which tends to affect the credit and standing of a man and imputes disreputable conduct and moral delinquency is libelous without allegation of special damages. *Stokes v. Stokes*, 76 Hun, 314, 28 N. Y. Supp. 165, 59 St. Rep. 187.

A notice stating that plaintiff was reported as soliciting advertisements for a newspaper and had no authority to do so, and that "any such statement on his part is fraudulent, deceptive, and for dishonest and malicious purposes."—*Held* libelous. *Daniel v. N. Y. New Publishing Co.*, 51 St. Rep. 18, 21 N. Y. Supp. 862.

A charge in an article to the effect that the plaintiff was a brute in his business is actionable under *O'Shaughnessy v. Morning Journal Assn.*, 71 Hun, 47, 24 N. Y. Supp. 609.

An allegation that plaintiff's services had been dispensed with

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by reason of his careless manner of attending to business, etc., states words tending to injure the plaintiff in his business and is libelous. *Ratzel v. N. Y. News Publishing Co.*, 35 Misc. Rep. 487, 71 N. Y. Supp. 1074.

A letter having charged plaintiff with having subscribed defendant's name to a receipt for money without authority and for the purpose of defrauding him out of the money, saying "It is not my purpose to call hard names; the statute fixes the name and punishment," is libel. *Snyder v. Andrews*, 6 Barb. 43.

The statement in regard to nonpayment of an undertaker's bill, that "no consultation was had with Gen. Grant's family to determine as to the justice of the payment, although such consultation could easily have been had, and the injustice of the claim have been made manifest," is libelous. *Holmes v. Jones*, 121 N. Y. 461, 31 St. Rep. 379, reversing 50 Hun, 345, 20 St. Rep. 175, 3 N. Y. Supp. 156.

An article referring to plaintiff as a physician calling him a blockhead or fool, and appealing to a certain class in the city among whom he practiced largely, not to entrust themselves or their families to his professional care, is libelous *per se*. *Krug v. Pitass*, 162 N. Y. 154, 56 N. E. 526.

A publication implying that plaintiff, who was engaged in the business of adviser in insurance affairs, was not regarded as a "properly commissioned and reputable deputy,"—*Held* libelous. *Hollingsworth v. Spectator Co.*, 49 App. Div. 16, 63 N. Y. Supp. 2.

*Labouisse v. Evening Post Publishing Co.*, 10 App. Div. 30, 41 N. Y. Supp. 688, is distinguished on the ground that the publication on its face was calculated to aid and not to injure the plaintiff in his business. And *Ertheiler v. Bernheim*, 37 App. Div. 472, 56 N. Y. Supp. 26, is distinguished on the ground that the words used were innocent and harmless when construed in accordance with their natural meaning.

*Moore v. Francis*, 121 N. Y. 199, holds that words written or spoken of one in relation to his business or occupation which will have a tendency to hurt, or are calculated to prejudice him therein, are actionable *per se*, although they charge no fraud or dishonesty, and were uttered or written without actual malice. *Sanderson v. Caldwell*, 35 N. Y. 398 (405), to same effect.

A publication charging a corporation named in collecting news and furnishing it to newspapers, with obtaining such news by



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tapping a telegraph wire used by a rival corporation, is libelous *per se*. *Union Associated Press v. Heath*, 49 App. Div. 247, 63 N. Y. Supp. 96.

Statement that a man failed for a large amount and has lots of money, meaning that he has defrauded his creditors, is libelous *per se*. *Charwat v. Vopelak*, 19 Misc. Rep. 500, 44 N. Y. Supp. 26, affirming 18 Misc. Rep. 601, 42 N. Y. Supp. 235.

So also is the publication of a circular, charging a person with dishonesty in his business. *Davey v. Davey*, 22 Misc. Rep. 668, 50 N. Y. Supp. 161.

Nothing can be said to be libelous of a man in his profession unless it degrades or lowers him in his professional character generally, and it is not a libel to say of one in regard to any particular work that he has fallen below the proper standard, or made a failure. *Battersby v. Collier*, 34 App. Div. 347, 54 N. Y. Supp. 363.

A publication that plaintiff, a practicing dentist, had committed suicide is libelous *per se*, as injuring his profession. *Cady v. Brooklyn Union Pub. Co.*, 23 Misc. Rep. 409, 51 N. Y. Supp. 198.

Charging a brewer with filthy practices in preparing his malt is libelous. *Fidler v. Delavan*, 20 Wend. 57; *Ryckman v. Delevan*, 25 Wend. 186.

A charge that plaintiff used his newspaper to threaten, dog, spite, and persecute dealers in bonds, who refused to subscribe for or advertise in his newspaper, and to cry down the bonds they purchased, used the language: "His practices being utterly indefensible, infringing upon, if not actually crossing the line of downright criminality," is held to be libelous *per se*. *Shanks v. Stumpf*, 23 Misc. Rep. 264, 51 N. Y. Supp. 154.

A circular charging, among other things, plaintiff with having secured a large amount of defendant's assets, etc., held to be libelous. *Carpenter v. Hammond*, 1 St. Rep. 551.

Publication that plaintiff, an attorney, was recommended for removal from his position as counsel for the Federal treasury department, on the ground of inefficiency, as the result of an investigation by special agents of the department, published after his removal from office, is libelous *per se*, as charging him with unfitness and incompetency in his profession when so made by

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innuendo. *Gibson v. Sun Printing & Pub. Assn.*, 71 App. Div. 566, 76 N. Y. Supp. 197.

A circular issued by a commercial agency containing the name of the plaintiff, his address, and business, followed by stars, with a reference at its foot: "For explanation please call at our office," is held not capable of a construction which is libelous. *Kingsbury v. Bradstreet Co.*, 35 Hun, 212, affirmed 116 N. Y. 211.

Statement made by a mercantile agency, to the effect that a judgment had been rendered against plaintiff, who had been engaged in business, which was untrue, was held not to give cause of action. It seems that upon averment and proof of special damage resulting from false publication an action would be sustainable. *Woodruff v. Bradstreet Co.*, 116 N. Y. 217.

The Supreme Court (35 Hun, 212), per Childs, J., says: "The law applicable to this class of cases is well settled by the authorities as follows:

"First. The proprietors of a commercial agency engaged in collecting and publishing, for circulation among all its patrons, information as to the standing and financial credit of merchants and traders, are liable for a false report thus disseminated, injurious to the credit of the subject of it, although made in good faith and upon information deemed reliable. (*Sunderlin v. Bradstreet*, 46 N. Y. 188.)

"Second. In an alleged libel, if the application or meaning of the words is ambiguous, or the sense in which they were used is uncertain, and they are capable of a construction which would make them actionable, although at the same time an innocent sense can be attributed to them, it is for the jury to determine upon all the circumstances, whether they were applied to the plaintiff, and in what sense they were used. (*Sanderson v. Caldwell*, 45 N. Y. 398.)

"Third. In all civil suits, the question of libel or no libel, where it arises solely on the face of the publication, is a question of law, upon which the jury must follow the direction of the court. (*Matthews v. Beach*, 5 Sandf. 256; *Green v. Telfair*, 20 Barb. 11.)"

A publication in a medical journal, stating that there was a false joint in the jaw of a patient treated by dentist,—Held not libelous, in an action by the dentist, who alleged that he had treated patients successfully and had so reported. *Gunning v. Appleton*, 58 How. 471.

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To call a physician, homeopath or allopath, a quack, is an act charging him with a want of the necessary knowledge or training to practice a system of medicine which he undertakes to practice, and which he holds himself out, as having, by undertaking to practice. To call either a quack is actionable. *White v. Carroll*, 42 N. Y. 161.

This language set out in the complaint with reference to medical graduates, in which plaintiff was described "as a jackass, disguised as a doctor, a brute, graduated to care for the sick, a ghoul, graduated to mutilate the dead, a degenerate graduate deserving arrest and punishment, a savage unworthy to retain his diploma,"—*Held* to assail plaintiff in his professional capacity, and the article libelous. *Bornmann v. Star Co.*, 174 N. Y. 212.

Words concerning one in charge of a department of a newspaper, published in a letter circulated by it, that plaintiff and others in the employ of defendant "have been dispensed with, the reason of the change being a general careless manner of attending to our business," are actionable *per se*. *Ratzel v. N. Y. Pub. Co.*, 35 Misc. Rep. 487, 71 N. Y. Supp. 1074.

In *Lurman v. Jarvie*, 82 App. Div. 37, plaintiff brought an action to recover damages for injury to his business reputation, which was likened to one for slander or libel. Plaintiff alleged that a committee of board of managers, of which he was a member, had improperly suspended him from the privileges of that body,—*Held* plaintiff could not recover.

A letter charging a merchant with cutting prices on a certain article, but which does not charge that plaintiff was bound by any agreement not to cut prices, or that he was connected with any contract to maintain them, is not libelous *per se*. *Willis v. Eclipse Mfg. Co.*, 81 App. Div. 591, 81 N. Y. Supp. 359.

Words imputing insanity are actionable *per se*, when written or spoken of one occupying a position of trust and confidence in relation to his occupation. *Moore v. Francis*, 121 N. Y. 199.

The rule as laid down in this case seems to be that spoken words imputing insanity are actionable *per se*, when spoken of one in his trade or occupation, but not otherwise, but that written words imputing insanity are libelous *per se*, as well as when they affect one in his trade or occupation, although the decision in that case was placed upon the ground that the allegation touched the plaintiff in his business.

The following words held question for the jury to determine,

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whether uttered and understood in their libelous rather than their harmless signification:

"Under date of February 3rd, you sent us a letter recommending A. F. Payne as being worthy of confidence and entitled to a position of manager of one of our stores. We gave him a position, and as a result lost \$2,000 by him. Investigation of his actions during the time he was in charge of our business showed that he spent the greater part of his time playing pool, and that he had questionable connections in the suburbs of Pittston, where our store was.

"We mention these facts that you may know the true character of the man, and will be glad to have you tell us where he can be found at present, if you know, or whether his people are in your vicinity, and if you think there would be any chance of recovering any part of the amount lost by him." *Payne v. Rouss*, 46 App. Div. 315, 61 N. Y. Supp. 705.

To impute that one has acted in business matters under a contract or obligation entered into by an assumed name is not libelous. *Bell v. Sun Pub. & Printing Assn.*, 3 Abb. N. C. 157.

Notice in a newspaper advising applicants for board at a specified street and number to "inform themselves before locating there, as to table, attention, and characteristics of the proprietors," is not libelous on its face. *Wallace v. Bennett*, 1 Abb. N. C. 478.

A communication by a banker, in the country, to a mercantile house in New York, regarding the responsibility of a customer whose note had been sent him for collection, is privileged; in order to maintain an action for libel, express malice must be shown and cannot be inferred from the mere falsity of the statement. *Lewis v. Chapman*, 16 N. Y. 369.

Compare also cases under "Slander," art. IV, subd. 3.

## SUBDIVISION 5.

## Words Holding One up to Scorn or Ridicule.

In *Brooks v. Bemiss*, 8 Johns. 356, it was held charging that plaintiff was a liar was libelous.

It is clearly libelous to publish of another that "He is insane and a fit person to be sent to the lunatic asylum," or "that he is so disordered in his senses as to endanger the persons of other people if left unrestrained, and that it is dangerous to permit him longer to go at large." The libelous character of such language

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is not destroyed or diminished by the fact that the person uttering it is a physician and makes the statement as a professional opinion. It will only be privileged when made in the discharge of duty. *Perkins v. Mitchell*, 31 Barb. 461, holding that this puts plaintiff in an odious light and exposes him to public contempt, citing Black. Definition of Libel, 3 Comm. 125, 4 Comm. 150, 5 Rep. 125; Lord Holt, 3 Salk. 226; 1 Starkie, 153.

The principal case cited in *Lowrie v. Press Publishing Co.*, 48 App. Div. 319, together with *Morey v. M. J. Assn.*, 123 N. Y. 207; *Shelby v. Sun Printing Assn.*, 38 Hun, 474, affirmed 109 N. Y. 611; *Winchell v. Argus Co.*, 69 Hun, 354, 23 N. Y. Supp. 650, as to what words are libelous. See *Moore v. Francis*, 121 N. Y. 199.

Where an artist painted the ears of an ass upon the head of a person whose portrait he had painted, and who had refused payment therefor, and also caused notice of the sale and alteration in the picture to be published in a newspaper, it was held that the alteration was a libel if done through resentment. *Mezzaraz Case*, 2 City Hall Recorder, Gen. Sess. 1817, Abb. Dig. Libel, vol. 4, p. 232.

Where the defendant, who was the editor of a newspaper, owed the plaintiff on an award of arbitrators, in speaking of which and of the plaintiff in an article in his paper, defendant said "the money will be forthcoming on the last day allowed by the award, but we are not disposed to allow him to put it into Wall street for shaving purposes before that time,"—*Held* not to be libelous. *Stone v. Cooper*, 2 Den. 293.

A charge that plaintiff was known in a certain county and would not like to bring an action there for libel imputes to him a bad reputation, and is libelous. *Cooper v. Greeley*, 1 Den. 347.

An article purporting to give the "true history of a great mining enterprise," stating that plaintiff was employed to prepare "the mine in question in such a way as to give the appearance of value and comparing his services to those of a speculator in disposing of the stock,"—*Held* to be libelous. *Williams v. Godkin*, 5 Daly, 499.

Although mere poverty is no crime and ought not to expose any person to ridicule, yet one may be so circumstanced, and the fact of his alleged misery may be so put as to excite ridicule and nothing else. In an action for libel for statement of this char-

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acter, the inquiry is as to the natural effect of the publication, not only upon the general public, but upon the neighbors and friends of the person named. *Moffatt v. Cauldwell*, 3 Hun, 26, 5 T. & C. 256, cited together with *Patch v. Tribune Assn.*, 38 Hun, 368, and distinguished in *Battersby v. Collier*, 24 App. Div. 89, 48 N. Y. Supp. 976, the same case, 34 App. Div. 347, 54 N. Y. Supp. 363, passing upon other points.

A published statement that a married man is threatened with a breach of promise suit is libelous *per se*. *Morey v. Morning Journal Assn.*, 123 N. Y. 207, 33 St. Rep. 49, affirming 17 St. Rep. 276, 1 N. Y. Supp. 475.

A newspaper was held for libel for the publication of an unauthorized advertisement as follows: "Le Huray Sisters, Blanche, Stella, and Allien, just from Paris; massage, French style; love secrets; how to get a husband; enclose stamp; valuable information for ladies by aid of cards. Le Huray Sisters, 444 2d ave., Mount Vernon, N. Y." *Stafford v. Morning Journal Assn.*, 68 Hun, 467, 22 N. Y. Supp. 1008, affirmed 142 N. Y. 598.

A statement charging a person with being at the head of a movement to raise a corruption fund in England for the purpose "of buying votes and other dishonorable expedients to bring about the election of Mr. Cleveland" as president, and further alleging that the money was not to be used for the legitimate expenses, but in "the debauchment of the ballot," is libelous *per se*. *Van Ingen v. Star Co.*, 1 App. Div. 429, 37 N. Y. Supp. 114, affirmed on opinion below, 157 N. Y. 695.

An article stating that the failure of plaintiff's farm was caused by his reckless speculation is held libelous. *Sawyer v. Bennett*, 49 St. Rep. 774, 20 N. Y. Supp. 935.

A publication stating that a property owner in the city of New Rochelle went to Albany to urge the passage of a bill for the construction of a sewer in front of his premises, and that, in doing so, he was actuated by a desire to relieve himself of a local assessment for the construction of the sewer and to impose the cost of such construction upon the taxpayers of the city generally, is not libelous *per se*, as it does not charge the property owner with doing anything that a citizen may not lawfully do. *Foot v. Pitt*, 83 App. Div. 76.

Writings which impute to the plaintiff immoral and disgraceful complicity in connection with a swindle and reproach him

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with culpable, if not criminal, misbehavior in the management of the business, are libelous. *Hartman v. Morning Journal Assn.*, 46 St. Rep. 181, 19 N. Y. Supp. 401.

A statement with regard to a minister "it is claimed he was too much of a family man; he is still under cover," is libelous *per se*. *Johnson v. Synett*, 89 Hun, 192, 35 N. Y. Supp. 79, affirmed on opinion below, 157 N. Y. 684.

*O'Shaughnessy v. Morning Journal Assn.*, 71 Hun, 47, 24 N. Y. Supp. 609; *Gallup v. Belmont*, 41 St. Rep. 233, 16 N. Y. Supp. 483, affirmed 135 N. Y. 647, illustrate respectively what allegations and statements do and do not render publisher thereof liable in an action for libel.

A statement that a married woman has eloped is libelous *per se*. Its falsity imputes malice without proof. *Smith v. Matthews*, 6 Misc. Rep. 162, 27 N. Y. Supp. 120.

So of an article charging that a married woman had registered with a man under an assumed name as husband and wife. *Gray v. Baker*, 47 St. Rep. 375, 19 N. Y. Supp. 940.

Statements that a woman lived with a man not her husband, as his wife, are libelous. *Mooney v. Bennett*, 44 App. Div. 423, 60 N. Y. Supp. 1103; *Mooney v. N. Y. News Pub. Co.*, 48 App. Div. 271, 62 N. Y. Supp. 781.

An article stating that plaintiff was walking with C.'s wife when the deserted husband came up, and a fight followed in which Mrs. C. drew a revolver and shot her husband, for which she was convicted of murder, and that plaintiff was tried for complicity in the crime but was not convicted, is libelous *per se*, since it tended to degrade plaintiff and hold him up to public obloquy. *D'Andrea v. New York Press Co.*, 61 App. Div. 605, 70 N. Y. Supp. 759.

The account which stated that the defendant in the action for divorce and a sister had been adopted by a leading physician of Louisville, and that "it is said that both the daughters are illegitimate children of the adopted father's intimate friend, and were raised in a spirit of philanthropy," is libelous. *Shelby v. Sun Printing Assn.*, 38 Hun, 474.

A statement concerning a woman that she is said to be a concert hall singer and dancer at Coney Island is libelous *per se*, when published in a community where the character of Coney Island is well known. *Gates v. New York Recorder Co.*, 155 N. Y. 228.

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A statement that plaintiff is soliciting advertisements for a newspaper and had no authority to do so, and that "any such statement on his part is fraudulent, deceptive, and for dishonest and malicious purposes,"—*Held*, as to the last sentence, libelous. *Daniel v. New York Press Publishing Co.*, 51 St. Rep. 18, 21 N. Y. Supp. 862.

It is libelous to publish of the plaintiff that "he went to Utah where he joined the Mormons, and at one time had a good deal of influence in church matters at Salt Lake." *Witcher v. Jones*, 17 N. Y. Supp. 491.

Charging a man with being "perfectly unreliable," that "he cannot tell the truth," that "any financial obligation does not seem to distress him in the least," and that "he has been more than mean to me," is libelous *per se*. *Rider v. Rulison*, 74 Hun, 239, 26 N. Y. Supp. 234.

Allegations that the plaintiff "made his name notorious and hated" and that his "language and actions became more and more reprehensible" cannot be said to in no manner reflect on the plaintiff's moral character. *Remsen v. Bryant*, 36 App. Div. 240, 56 N. Y. Supp. 728.

In *Gallagher v. Bryant*, 44 App. Div. 527, 60 N. Y. Supp. 844; *Payne v. Rouss*, 46 App. Div. 315, 61 N. Y. Supp. 705, it was held that the language used in the printed statement was such as to require the jury to determine whether or not it was libelous.

Words which tend to diminish the respectability of a person and expose him to disgrace, ridicule, and obloquy as "a lazy brute, he lives in idleness and lets his family starve," are libelous. *Winchell v. Argus Co.*, 69 Hun, 364.

An article stating, "There may be an explanation. The only decent one we can ourselves imagine (and that is hardly, however, decent) is that the respected board of health wanted something done in the line of spying and sneaking, meaner and dirtier than they had the face to ask the police department to do, and so they went to B. (the plaintiff)," is libelous. *Byrnes v. Matthews*, 12 St. Rep. 74, citing numerous cases and discussing fully numerous phases of the law of libel, affirmed without opinion. 109 N. Y. 662.

A publication concerning a member of a particular union which calls him a "scab" is libelous *per se*. *Prince v. Socialistic Co-operative Publishing Co.*, 31 Misc. Rep. 234, 64 N. Y. Supp. 285.



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An allegation that defendant furnished a customer with domestic article instead of imported one ordered by plaintiff is demurrable since the language was not slanderous *per se*. *Verbeck v. Duryea*, 36 Misc. Rep. 241, 73 N. Y. Supp. 346.

Where the tendency of an article is to disgrace plaintiff and bring her into contempt and ridicule, it is libelous *per se*. *Howell v. Press Publishing Co.*, 48 App. Div. 318 (321), 62 N. Y. Supp. 908.

It is not libelous *per se* to publish concerning a baker that he had declared a fight against a baker's union and refused to employ its members because they would not work for him for fifty cents a day, the publication not touching him in his general character or his business. *Smid v. Bernard*, 31 Misc. Rep. 35, 63 N. Y. Supp. 278.

But a publication concerning plaintiff "this tenement house boss Prince and member of Union 251 had the audacity to slander old and reliable members whom necessity compels to live in tenement houses of their bosses, while he himself runs a tenement house factory and as a miserable scab works six days in a shop and thereby robs other poor devils out of their bread," is libelous *per se*. *Prince v. Socialistic Co-operative Pub. Assn.*, 31 Misc. Rep. 234, 64 N. Y. Supp. 285, reversing 29 Misc. Rep. 773, 61 N. Y. Supp. 1145.

*W. C. Loftus & Co. v. Bennett*, 68 App. Div. 128, 74 N. Y. Supp. 290, considers what words are libelous as against a corporation in connection with its business.

A newspaper article merely accusing a wife of having been the cause of her husband's suicide is not libelous. *Brown v. Tribune Assn.*, 74 App. Div. 359, 77 N. Y. Supp. 461.

A statement that one not a citizen or subject of a foreign State, but a resident therein, was engaged in rebellion against such power, is not libelous *per se*. *Crashley v. Press Publishing Co.*, 74 App. Div. 118, 77 N. Y. Supp. 711.

It is not libelous *per se* to say of a person that he has consumption, or that he once had it. *Rade v. Press Publishing Co.*, 37 Misc. Rep. 254, 75 N. Y. Supp. 298.

The words, "She went to prison for an operation. She sank so low. She said it cost \$5," occurring in a newspaper account of proceedings on a motion made by plaintiff to secure support from her husband are not susceptible of the meaning ascribed

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to them by plaintiff that she was charged with having committed a crime, with having been punished therefor by imprisonment, and with having sunk low in the community. *Wuest v. The Brooklyn Citizen*, 38 Misc. Rep. 1, 76 N. Y. Supp. 706.

## ARTICLE VI.

### INTERPRETATION, CONSTRUCTION, AND APPLICATION OF LANGUAGE.

The rule with respect to ambiguities, or words questionable as to their meaning, is laid down by Starkie, p. 45, as follows: "Both judges and juries shall understand words in that sense which the author intended to convey to the minds of the hearers, as evidenced by the whole circumstances of the case. That it is the province of the jury, where such doubts arise, to decide whether the words were used maliciously and with a view to defame, such being matter of fact to be collected from all concomitant circumstances; and for the court to determine whether such words, taken in the malicious sense imputed to them, can alone, or by the aid of the circumstances stated upon the record, form the legal basis of an action."

Formerly courts construed language *in mitiori sensu*. This practice has been abandoned. Townshend, 179, citing numerous authorities.

Words are to be construed according to their common acceptance. The doctrine of *mitiori sensu* has long been exploded. It is not competent to inquire of the witnesses how they understood the words. *Pelton v. Ward*, 3 Cai. 76; *Demerast v. Haring*, 6 Cow. 76; *Goodrich v. Woolcott*, 3 Cow. 231, 5 Cow. 714; *Wright v. Paige*, 36 Barb. 438; *Van Vechten v. Hopkins*, 5 Johns. 211; *Weed v. Bibbins*, 32 Barb. 315.

In *Turrill v. Dolloway*, 17 Wend. 428, it is said, "There was a time when courts thought it a duty to understand words charged to be slanderous in the most mild and inoffensive sense, when they adopted unnatural and strained constructions of the language for the purpose of proving that it did not necessarily and with absolute certainty impute a crime. But that day has long since gone by, and the rule of common sense has become the rule on this subject. Judges and jurors now read the words in court as they would read them elsewhere; they no longer resort to those

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constructions which make that language innocent in the halls of justice, which was full of calumny when spoken or published out-of-doors. *Swan's Pl. & Prac.* 210-216." *Maxwell on Code Pleading*, 207.

To determine whether a statement is defamatory it must be construed in its natural and ordinary meaning. If not defamatory in such meaning, it must be construed in the special meaning, if any, in which it was understood by the persons by and to whom it is published. *Fraser*, 9; *Hale*, 296; *Woodruff v. Bradstreet Co.*, 116 N. Y. 219.

The language of *McCloskey v. Cromwell*, 11 N. Y. 593, with reference to the interpretation of statutes and contracts may well be applied to the interpretation of words alleged to be libelous or slanderous. Judge Allen says (p. 601): "It is not allowable to interpret what has no need of interpretation, and when the words have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning. Statutes and contracts should be read and understood according to the natural and most obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending their operation.

If the words used are capable of two constructions, it is for the jury to determine in what sense they were intended. *Wolcott v. Goodrich*, 5 Cow. 714; *Van Vechten v. Hopkins*, 5 Johns. 211; *Dexter v. Taber*, 5 Johns. 239; *Gibson v. Williams*, 4 Wend. 320; *Cook v. Bostwick*, 12 Wend. 48; *Ex parte Bailey*, 2 Cow. 479.

If the application or meaning of the words in an alleged libel is ambiguous or the sense in which they were used is uncertain, and they are capable of a construction which would make them actionable, although, at the same time, an innocent sense can be attributed to them, it is for the jury to determine, upon all the circumstances, whether they were applied to the plaintiff, and in what sense they were used. *Sanderson v. Caldwell*, 45 N. Y. 398.

If language is ambiguous and capable of two constructions, one imputing crime and the other not, the question should be submitted to the jury to determine in what sense it was understood. *Clapp v. Devlin*, 3 J. & S. 170; *Middleton v. Walter*, 1 Week. Dig. 407; *Brooklyn City Court*, 1 Week. Dig.

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407, affirmed 67 N. Y. 584; *McGibbon v. Young*, 20 Week. Dig. 12; *Vaus v. Middlebrook*, 3 St. Rep. 277; *Schoonhoven v. Beech*, 23 Week. Dig. 348; *Bannon v. Cleary*, 6 St. Rep. 36; *Mason v. Stratton*, 17 St. Rep. 302, 1 N. Y. Supp. 511; *Hays v. Ball*, 72 N. Y. 418, where it is said that if it had appeared that when the words were spoken they were accompanied with such an explanation as would make it clear that they referred to an innocent transaction, or to a transaction which in law could not have constituted larceny, the motion for nonsuit should have been granted; or if it had appeared that all the persons who were present understood from the facts which they knew or had otherwise learned that the words referred to a transaction which could not in law constitute larceny, the same result would follow. But that without an explanation accompanying the use of the words giving them a different meaning, or unless all the hearers understand they refer to a transaction which would not constitute a crime, the language is to be given its ordinary import and meaning. Citing *Mayor of New York v. Lord*, 17 Wend. 296; *Sheppard v. Steel*, 43 N. Y. 60, and cases *supra*.

In *Warner v. Southall*, 165 N. Y. 496, affirming 31 App. Div. 375, 52 N. Y. Supp. 320, *Hays v. Ball* is followed, and the rule laid down that "if the words are ambiguous and capable of two constructions, one imputing larceny and the other not, it is for the jury to determine in what sense they were understood.

Language should be given its ordinary meaning unless accompanied either by words of explanation or by reference to a known and particular circumstance. *Van Rensselaer v. Dole*, 1 Johns. Cas. 279; *Bannon v. Cleary*, 6 St. Rep. 36; *Spencer v. Southwick*, 11 Johns. 573.

Where the language of an alleged libel is ambiguous and capable of being understood in an innocent and harmless, as well as an injurious sense, its true interpretation is a question for the jury. *Lewis v. Chapman*, 16 N. Y. 369; *Vaus v. Middlebrook*, 3 St. Rep. 277; *Mason v. Stratton*, 17 St. Rep. 302, 1 N. Y. Supp. 511; *Dollaway v. Turrill*, 26 Wend. 383, reversing 17 Wend. 426; *Dexter v. Tabor*, 12 Johns. 239; *Goodrich v. Wolcott*, 3 Cow. 231; *Rundell v. Butler*, 7 Barb. 260; *Sanderson v. Caldwell*, 45 N. Y. 398; *Ronnie v. Ryder*, 28 St. Rep. 141, 8 N. Y. Supp. 5; *Lally v. Emery*, 59 Hun, 237, 12 N. Y. Supp. 785; *Clapp v. Devlin*, 3 J. & S. 170.

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It is the settled law that where the publication is admitted and the words are unambiguous, and admit of but one sense, the question of libel or no libel is one of law which the court must decide. *Snyder v. Andrews*, 6 Barb. 43; *Hunt v. Bennett*, 19 N. Y. 173; *Lewis v. Chapman*, 16 N. Y. 369; *Kingsbury v. Bradstreet Co.*, 116 N. Y. 211; *Moore v. Francis*, 121 N. Y. 199.

Words to be libelous are to be taken in that sense in which those persons to whom the publication should come would be most likely to understand them. If the application or meaning of the words is ambiguous, or the sense in which they are used is uncertain, and they are capable of a construction which would make them actionable, although at the same time an innocent sense might be attributed to them, it is for the jury to determine, upon all the circumstances, whether they were applied to the plaintiff, and in what sense they were used. *Miller v. Donovan*, 16 Misc. Rep. 453, 39 N. Y. Supp. 820.

It is the duty of the court in an action for libel to understand the publication in the same manner as others would naturally do. The construction which it behooves a court of justice to put on the publication which is alleged to be libelous is to be derived as well from the expressions used as from the whole scope and apparent object of the writer. *Cooper v. Greeley*, 1 Den. 347.

Where a charge of crime is made against a person not named, but indicated by an intentional ambiguous description, the defendant is not entitled to have the words used favorably construed. *Gibson v. Williams*, 4 Wend. 320.

The scope and object of the whole article is to be considered and such construction put upon its language as would naturally be given to it. It is not enough that the critic may torture the expressions into a charge of criminal or disgraceful act, nor on the other hand that a possible and far-fetched construction may find an inoffensive meaning in the language. The test is, whether to the mind of an intelligent man, the tenor of the article and the language used naturally import a criminal or disgraceful charge. *Moore v. Bennett*, 48 N. Y. 472.

Where the publication is unambiguous and admits of but one sense, the question whether it is libelous is one of law for the court, but where the publication is capable of being construed in a harmless sense as well as in an injurious sense, an innuendo pointing out the meaning which the plaintiffs claims to be the

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true meaning is necessary to the sufficiency of a statement of the cause of action.

The plaintiff is bound by the innuendo, and if the jury negatives such innuendo or the court determines that the words used are not capable of the meaning alleged in the innuendo, judgment must be given for the defendant. *Beecher v. Press Publishing Co.*, 60 App. Div. 536, 69 N. Y. Supp. 895.

But where the complaint charges the use of words which may be or may not be harmless according to the intent and sense in which they were sued, an innuendo or allegation is necessary to the effect that they were used in a sense to render them actionable *Hemmens v. Nelson*, 138 N. Y. 517.

The submission to the jury, in an action for libel, of the question whether the alleged libelous language does not have a meaning, of which it is capable and which is not strained or unnatural, and which, if found, is declared by the court to be actionable, is not rendered erroneous by the fact that the language is also susceptible of an innocent meaning, provided such innocent meaning is also presented to the jury to find, with the instruction that if so found the language is not actionable. *Mattice v. Wilcox*, 147 N. Y. 624.

Words are none the less actionable because the defendant added "if reports were true." *Johnson v. Brown*, 57 Barb. 118.

The rule is that one speaking is accountable for the import of words as they are naturally understood by the hearer. *Harrison v. Thornborough*, 10 Mod. 196; *Gidney v. Blake*, 11 Johns. 54.

Explanatory circumstances known to both parties, speaker and hearer, are to be taken into account as a part of the words. *Andrews v. Woodmansee*, 15 Wend. 232; *Miller v. Maxwell*, 16 Wend. 9; *Dorland v. Patterson*, 23 Wend. 422.

It is not necessary, however, that a charge to be actionable should be made in direct terms. It may be made in ambiguous language or by insinuation. *Gibson v. Williams*, 4 Wend. 320; *Rundell v. Butler*, 7 Barb. 260.

And whether it was the intention of the defendant to charge a party with the crime imputed by the words is a question for the jury. *Dorland v. Patterson*, 23 Wend. 422.

Words in slander suits must be given their common and popular signification. *Thomas v. Smith*, 75 Hun, 573, 27 N. Y. Supp. 589.

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If the words spoken in their natural and ordinary sense import a criminal charge they are actionable. There need not be the same certainty in stating the crime imputed as would be requisite in an indictment. *Gibbs v. Dewey*, 5 Cow. 503; *Miller v. Miller*, 8 Johns. 74.

Nor need the words used involve a direct and positive affirmation; if they impute a crime by fair construction, an action may be maintained. *Rundell v. Butler*, 7 Barb. 260; *Gorham v. Ives*, 2 Wend. 534.

The apparent holding to the contrary in *Andrews v. Woodmansee*, 15 Wend. 232; *Dorland v. Patterson*, 23 Wend. 422, seems to turn upon questions of pleading rather than matter of substantive law, it being conceded in both cases that where words have a covert meaning, being spoken in ironical, oblique, or ambiguous terms, a recovery may be had if properly pleaded.

A publisher is liable for carelessly publishing defamatory matter concerning a person by confusing him with another person of the same name, where, if reasonable care had been taken, it could have been ascertained plaintiff was not the person intended, and punitive damages may be awarded. *Weber v. Butler*, 81 Hun, 244, 30 N. Y. Supp. 713.

It is not necessary, in order to justify a recovery, that the plaintiff be named in the alleged libelous article, but it is sufficient if description or reference identifies him. *Palmer v. Bennett*, 83 Hun, 220, 31 N. Y. Supp. 567.

It is error to submit a case to the jury upon the theory that because plaintiff's name was not correctly spelled in the article, the jury might find that the article did not refer to him, where plaintiff and another person named in the article were the only persons named in the transactions described, and there was no other person of the name in the locality. *Griebel v. Rochester Printing Co.*, 8 App. Div. 450, 40 N. Y. Supp. 759.

If plaintiff is not named in the publication he may be shown to be the person intended by proper averments in the complaint. *Parker v. Raymond*, 3 Abb. Pr. N. S. 343.

If the words did not necessarily refer to the plaintiff, he must either allege that they were intended to and were understood by others to be applicable to him, or the complaint must follow the Code and allege that the matter was published "of and concerning the plaintiff." *Crane v. O'Reilly*, 13 Civ. Proc. 71.

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## ARTICLE VII.

## PUBLICATION AND REPETITION.

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## SUBDIVISION 1.

## Publication.

Every person is liable to an action who is concerned in the publication of a libel, whether he be the author, printer, or publisher, and the extent and manner of the publication, although not affecting the ground of the action, is a material element in estimating the damages. *Encyc. Britannica* (Article "Libel"), p. 505.

Publication is the communication of defamatory words to some third person or persons. It is essential to the plaintiff's case that defendant's words should be expressed; the law permits us to think as badly as we please of our neighbors so long as we keep our uncharitable thoughts to ourselves. It is no publication when the words are only communicated to the person defamed. A man's reputation is the estimate in which others hold him, not the good opinion which he has of himself. The burden lies on plaintiff to prove publication. *Odgers*, 151.

To constitute an actionable publication, such as may confer a remedy by action, it is essential that there be a publication to a third person, that is, to some person other than the author or publisher, and the person whom or whose affairs the language concerns. No possible form of words can confer a right of action for slander or libel unless there has been a publication to some person. *Townshend*, 83, citing *Starkie*, 13, 14.

No action can be maintained for libel or slander unless there had been a publication, that is, a communication by the defendant, of the words complained of to some person other than the plaintiff. *Fraser*, 99.

Unless a libel is communicated to some third person no damage, either actual or presumed, can result. *Youmans v. Smith*, 153 N. Y. 214 (218), citing *Holt*, 281, to the proposition that, until the publication, the act is not complete in its mischief; before it is dispersed abroad it can produce no present or actual injury,



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either to the public or individual, and, until then, there is a *locus penitentius* on the part of those concerned in the composing and writing.

Uttering slanderous words in the presence of the person slandered only is not actionable. *Haile v. Fuller*, 5 T. & C. 716, 2 Hun, 519.

To constitute a publication the words must be heard and understood by a person other than plaintiff to whom they were addressed. *Broderick v. Holmes*, 3 Daly, 481.

Sending a sealed letter to plaintiff is not a publication which will sustain a civil action. *Lyle v. Clason*, 1 Cai. 581; *Waistel v. Hulman*, 2 Hall, 172.

But where the writer of a letter containing libelous matter reads it aloud to another, it is a publication. *Snyder v. Andrews*, 6 Barb. 43.

In England it is held that a communication by a defendant to his wife is not a publication. *Wemmliak v. Morgan*, 20 Q. B. Div. 635.

To read a libelous letter to another is evidence of publication, although if plaintiff invited and procured the publication of the letter for the purpose of making it the foundation of an action, such publication is privileged, unless there has been a previous publication by the defendant. *Miller v. Donovan*, 16 Misc. Rep. 453, 39 N. Y. Supp. 820.

But the fact that a letter having reference to the business of a corporation, and containing libelous matter, is dictated by the manager to a stenographer who typewrites and mails it, both persons being engaged in the performances of duties which their respective employments require, does not constitute such a publication as will sustain an action for libel against a corporation. *Owen v. Ogilvie Pub. Co.*, 32 App. Div. 465, 53 N. Y. Supp. 1033.

One, who on the employment or the author, prints libelous matter, concerning another, and delivers the printed copies to the author, knowing that he intends to submit them to various persons to be read, becomes liable as a publisher from the moment that any third person reads the matter, provided the same is not privileged. *Youmans v. Smith*, 153 N. Y. 214.

A newspaper published in Ohio contained a libel of a citizen of New York, and was sold and circulated in New York,—*Held*,

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that a cause of action for libel arose in this State. *Vitolo v. Bee Pub. Co.*, 66 App. Div. 582, 73 N. Y. Supp. 273.

In an action for libel, it is not competent for a plaintiff to prove that, subsequent to the publication, the libel was read in a public assemblage by a third person, and comments made upon it in the presence and hearing of the defendant. *O'Brien v. Bennett*, 72 App. Div. 367 (371), 76 N. Y. Supp. 498, and cases cited.

So evidence may be given that the libel was posted in public places by persons unknown, the presumption of the law being that such persons acted at the solicitation and by the procurement of the defendant. *Rice v. Withers*, 9 Wend. 139.

In *Andres v. Wells*, 7 Johns. 260, at p. 262, Spencer, J., in delivering the opinion of the court, lays down the rule as to the liability of the proprietor of a newspaper in an action for libel. This case is cited with approval in *Dole v. Lyon*, 10 Johns. 447, opinion of Kent, Ch. J., p. 461, and is followed. The opinion proceeds as follows: "It is not sufficient that the printer, by naming the author, gives the party aggrieved an action against him. This reason of the rule is mentioned in Lord Northampton's case and repeated by Lord Kenyon. But this remedy may afford no consolation and no relief to the injured party. The author may be some vagrant individual who may easily elude process; and, if found, he may be without property to remunerate in damages. It would be no check on a libelous printer, who can spread calumny with ease and with rapidity throughout the community. The calumny of the author would fall harmless to the ground, without the aid of the printer. The injury is inflicted by the press, which, like other powerful engines, is mighty for mischief as well as for good. I am satisfied that the proposition contended for on the part of the defendant is as destitute of foundation in law as it is repugnant to principles of public policy."

*Andres v. Wells*, *supra*, is also cited with approval in *King v. Root*, 4 Wend. 114 (136); *Hunt v. Bennett*, 19 N. Y. 173 (175).

The rule that the proprietor of a newspaper is responsible for any publication therein is recognized in *Martin v. Van Schoick*, 4 Abb. Pr. 479.

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The rule is again recognized in *Robertson v. Bennett*, 44 N. Y. Super. (12 J. & S.) 66.

The rule stated is recognized in *Sanford v. Bennett*, 24 N. Y. 20, in the opinion of Denio, J. (p. 22), in the following language: "It being impossible to deny the libelous character of the publication, or to maintain that the defendant was exempt from responsibility on account of the article having been copied from another newspaper, though it was stated to have been so copied, the only question is whether it was what was termed a privileged communication."

One who merely forwards a libelous communication at the request of another may be held liable for its publication. *Cheritree v. Roggen*, 67 Barb. 124.

A notice given by the proprietor of a newspaper to his employees that nothing reflecting upon the reputation of any person or corporation should be published in his newspaper until after strict investigation the truth of the same had been ascertained cannot be construed as a limitation of the power of the employees so as to absolve the proprietor from liability from consequences flowing from failure to conform to his requirements. Such notice was intended for their guidance and direction and was a warning to them. Their acts and disregard of that warning must in legal effect be considered as if they were his own. *Crane v. Bennett*, 77 App. Div. 102 (107), 79 N. Y. Supp. 66, citing *McMahon v. Bennett*, 31 App. Div. 16, 52 N. Y. Supp. 390; *Morgan v. Bennett*, 44 App. Div. 323, 60 N. Y. Supp. 619; *O'Brien v. Bennett*, 59 App. Div. 623, 69 N. Y. Supp. 298, holding that *Craven v. Bloomingdale*, 171 N. Y. 439, does not sustain a contrary view.

Publication is essential to a cause of action and is not established by defendant reading a letter written by him to plaintiff as evidence material and relevant, on the trial of an action, between the parties, in the presence of the referee and persons attending the trial. *Woodman v. Kidd*, 25 App. Div. 254, 49 N. Y. Supp. 301.

The secretary, treasurer, and owner of a majority of stock in a newspaper owned by an association which might be sued under the statute is not personally liable as principal for libelous matter published in a newspaper. *McCabe v. Jones*, 12 Week. Dig. 339.

Handing a printed pamphlet to the governor upon an argu-

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ment before him in favor of the passage of a bill awaiting his signature by a person who had not prepared said pamphlet and did not know its contents, was held not to be a publication, so as to sustain an action for libel. *Woods v. Wiman*, 47 Hun, 362, reversed 122 N. Y. 495, citing *Cook v. Hill*, 3 Sandf. 349; *Kex v. Baille*, 2 Esp. N. P. 91; *Howard v. Thompson*, 21 Wend. 327, upon the ground that there was evidence that defendant gave copies of the pamphlet to persons in the executive chamber who did not appear to have any connection with the hearing which was then being held.

By chapter 340, Laws 1890, it is made unlawful to state to a reporter libelous matter to procure its publication. It is not necessary in order that the offense should be within this provision, that the person should procure its publication. It is merely required that the publication be secured by reason of the statement made. *Thomas v. Smith*, 75 Hun, 573, 27 N. Y. Supp. 589.

Where the evidence in an action for libel, at most, only establishes that a person whom defendant knew to be a reporter asked him as to a report which was in circulation concerning matters alleged in the complaint, stating that he understood that defendant had asserted the facts which were subsequently published, and the latter admitted having done so, there being no proof that the latter's statement was made for publication, nothing having been said on the subject, and there being other evidence tending to show that defendant did not intend that it should be published and had no design to procure its publication, the refusal of the trial court to grant a nonsuit or to direct a verdict for defendant is reversible error, upon the ground that the proof was insufficient to establish a cause of action against him for libel. *Schoepflin v. Coffey*, 162 N. Y. 12.

A news-collecting agency which transmits, to each of the newspapers to which it furnishes news, a libelous article, which is published in each of such newspapers, incurs two distinct liabilities; first, for the original publication, consisting in the transmission of the article to the newspapers; and second, that of a joint tortfeasor with each newspaper which publishes the article; and the recovery and satisfaction of a judgment obtained against the news-collecting agency, is not a bar in an action against the publishers of a particular newspaper for the publication of the article therein. *Union Associated Press v. Heath*, 49 App. Div.

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247, 63 N. Y. Supp. 96, citing *Palmer v. N. Y. News Publishing Co.*, 31 App. Div. 212, 52 N. Y. Supp. 539; *Woods v. Pangburn*, 75 N. Y. 498, cited *Palmer v. United Press*, 67 App. Div. 68.

Printing a libel is regarded as a publication when possession of the printed matter is delivered with the expectation that it will be read by some third person, provided that result actually follows. He who furnishes the means of convenient circulation, knowing, or having reasonable cause to believe, that it is to be used for that purpose, if it is in fact so used, is guilty of aiding in the publication and becomes the instrument of the libeler. *Youmans v. Smith*, 153 N. Y. 218.

It is a sufficient allegation of publication that defendant was the proprietor of a newspaper in which the libel was published. *Hunt v. Bennett*, 19 N. Y. 173.

Where defendant's name was appended to the article as chairman of a meeting, and he admitted that he ordered the address to be published, it was held sufficient proof of publication. *Lewis v. Few*, 5 Johns. 1.

Evidence to the effect that a witness had seen a newspaper printed, and that the paper produced was printed he believed with the device used in defendant's office was held *prima facie* evidence of publication in *Southwick v. Stevens*, 10 Johns. 443.

And proof that the newspaper produced is similar to those left at the office of a subscriber, and that the libelous article was the same as that in the copy received by the subscriber, is sufficient proof of publication. *Huff v. Bennett*, 4 Sandf. 120.

So also proof that defendant was a corporation organized to publish a newspaper, and that the paper in which the libel was printed was published at defendant's place of business. *Marx v. Press Publishing Co.*, 34 St. Rep. 316, 12 N. Y. Supp. 162.

But publication is not established by proof that defendant sold copies of the newspapers containing the libel, unless proof is made that some one saw or read the libel in some of the papers so sold. *Prescott v. Tousey*, 18 J. & S. 12.

The forwarding by school trustees to a school teacher charged with improper conduct, written copies of statements of witnesses, is not a publication. *Galligan v. Kelly*, 64 St. Rep. 197, 31 N. Y. Supp. 561.

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## SUBDIVISION 2.

## Repetition.

It was held for a very considerable period in England, growing out of a *dictum* in the *Earl of Northampton's Case*, 12 Coke, 132 (1613), that the fact that language was only repeated by a person, and not originated by him, was a defense. Subsequently, in *Davis v. Lewis*, 7 T. R. (1796), the qualification was added that the defense must at the time of the repetition mention the name of the previous publisher. This rule was repudiated by Kent, Ch. J., in *Dole v. Lyon*, 10 Johns. 454 (461).

It is no defense that the defendant at the time of speaking of the words gave his author, who was in fact told by another what he uttered against the plaintiff. *Inman v. Foster*, 8 Wend. 602; *Mapes v. Weeks*, 4 Wend. 659. Compare *Sanford v. Bennett*, 24 N. Y. 20, *supra*.

It is no defense to an action that an article was copied from another paper although there was disbelief expressed of some of the allegations contained in it, but nothing said in affirmance or denial of the libelous charges. An action will lie for republishing a libelous article from another journal, though he quote his authority, and this without express malice. *Hotchkiss v. Oliphant*, 2 Hill, 510.

The repetition of injurious words as having been spoken by another is a libelous publication as much so if maliciously published and as if the direct charge had been made. *O'Shaughnessy v. Morning Journal Association*, 71 Hun, 47, 24 N. Y. Supp. 609.

"Under a single count in an action of slander, plaintiff may prove a repetition of the same slanderous charge, for the purpose of showing the degree of malice, and thus enhancing the damage. So, also, when the words charged are not actionable *per se*, but the plaintiff has alleged and proven special damage, she may show a repetition of the charge, although not spoken in the presence or brought to the knowledge of the one through whose action plaintiff sustained the special damage." *Bassell v. Elmore*, 48 N. Y. 561.

The rule with regard to allowing evidence of the repetition of

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slandorous words alleged in the complaint is laid down by Church, Ch. J., in *Distin v. Rose*, 69 N. Y. 122 (125), as follows:

"First. It is competent to prove the speaking of the same words charged in the complaint, at a period so long prior that the statute of limitations would be a bar to an action. (44 N. Y. 266.)

Second. A repetition of words, imputing the same charge, alleged in the complaint to have been made, may be proved to have been spoken at any time before the commencement of the action, but not words imputing a different charge. (6 Hill, 518; 4 N. Y. 161.)

Third. Nor can the same words be proved to have been uttered after the commencement of the action. (60 N. Y. 337.)"

"It is the prevailing doctrine that the reiteration of a libel or slander may be proved on the question of malice and damages, probably with this qualification, however, that the cause of action for the reiteration has been barred by the statute of limitations, or that the language subsequently reiterated is for some other reason not actionable. The authorities upon this point are not harmonious. Townshend on Slander and Libel (4th ed.), 653 *et seq.*; *Stuart v. Lovell*, 2 Stark. 84; *Thomas v. Croswell*, 7 Johns. 264; *Inman v. Foster*, 8 Wend. 602; *Keenholts v. Becker*, 3 Den. 346; *Root v. Lowndes*, 6 Hill, 518; *Johnson v. Brown*, 57 Barb. 118; *Thorn v. Knapp*, 42 N. Y. 474; *Titus v. Sumner*, 44 N. Y. 266; *Bassell v. Elmore*, 48 N. Y. 561; *Frazier v. McClosky*, 60 N. Y. 337; *Daly v. Byrne*, 77 N. Y. 182; *Cruikshank v. Gordon*, 118 N. Y. 178. No case holds that a repetition of a libel or slander after suit brought is in its nature not competent evidence on the question of malice and damage, and whenever it has been excluded as evidence it has always been upon the ground that it was an independent cause of action, and thus, if such evidence were received, that there would be danger of a double recovery." *Turton v. N. Y. Recorder Co.*, 144 N. Y. 144 (150).

If, after recovery and satisfaction for one slanderous utterance or libelous publication, the same defamatory matter is uttered or published again by the wrongdoer, this is a new injury and another cause of action, and there may be another recovery and satisfaction therefor. *Woods v. Pangburn*, 75 N. Y. 495, citing *Rockwell v. Brown*, 36 N. Y. 207.

The party who repeats slanderous words is alone liable for the damages incurred by his statement. *Terwilliger v. Wands*, 17

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N. Y. 54 (58), citing *Hastings v. Palmer*, 20 Wend. 225; *Keen-holtz v. Becker*, 3 Den. 346.

“Ordinarily, the repetition of defamatory language by another than the first publisher is not a natural consequence of the first publication, and, therefore, generally the loss resulting from such repetition does not constitute special damage, and is not attributable to the first publisher. This rule results from the principle that every one who repeats a slander is responsible for the damage caused by such repetition, and such damage is not the proximate and natural consequence of the first publication of the slander. But if the slander be repeated, under such circumstances, as to be justifiable and innocent, and not to give a cause of action against the one repeating the same, then the first publisher thereof is generally responsible for the damage caused by such repetition.” *Bassell v. Elmore*, 48 N. Y. 561 (564), citing *Terwilliger v. Wands*, 17 N. Y. 54; *Fowles v. Rowen*, 30 N. Y. 20.

It is said in *Schoepflin v. Coffey*, 162 N. Y. 12, opinion Martin, J. (17): “It is too well settled to be now questioned, that one who utters a slander, or prints and publishes a libel, is not responsible for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control, and who thereby make themselves liable to the person injured, and that such repetition cannot be considered in law a necessary, natural, and probable consequence of the original slander or libel. (Newall on Defamation, 245; Moak’s Underhill on Torts, 145; *M’Gregor v. Thwaites*, 3 B. & C. 35.) The remedy in such a case would be against the party who printed and published the words thus spoken, and not against the one speaking them, as a person is not liable for the independent illegal acts of third persons in publishing matters which may have been uttered by him, unless they are procured by him to be published, or he performed some act which induced their publication. (*Ward v. Weeks*, 7 Bing. 211; *Olmsted v. Brown*, 12 Barb. 657.) The repetition of defamatory language by another than the first publisher is not a natural consequence of the first publication, and, therefore, the loss resulting from such repetition is not generally attributable to the first publisher. This rule is based upon the principle that every person who repeats a slander is responsible for the damage caused by such repetition, and that such damage is not the proximate and natural consequence of the first publication of the slan-



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der. (*Bassell v. Elmore*, 48 N. Y. 564; *Fowles v. Bowen*, 30 N. Y. 20; *Terwilliger v. Wands*, 17 N. Y. 57, 58; *Laidlaw v. Sage*, 158 N. Y. 73.)"

For the rule as to proof of repetition, see "Evidence," art. XII.

## ARTICLE VIII.

## MALICE.

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## SUBDIVISION 1.

## Malice Generally Considered.

Malice has two significations. First, its ordinary meaning of ill-will against the person, and the other its legal signification which is a wrongful act done intentionally, without just cause or excuse. The first implies a desire and intention to injure; the latter is not necessarily so. But if false and defamatory statements are made without sufficient cause or excuse, they are legally malicious. These distinctions have been denominated malice in fact, and malice in law. The first indicating actual ill-will, the second simply that the act was wrongful. *Champlin, J., in Bacon v. Michigan Cent. R. R. Co.*, 55 Mich. 222, 1 Am. Lead. Cas. 193, cited in *Newell*, 321.

The term "malice" has a two-fold signification; there is malice in law, as well as malice in fact. In the former and legal sense it signifies a wrongful act, intentionally done without any justification or excuse. In the latter and popular sense it means ill-will toward a particular person; in other words, an actual intention to injure or defame him. *Gilmer v. Eubank*, 13 Ill. 274, cited in *Newell*, 323.

Every defamatory publication *prima facie* implies malice by the author and publisher toward the person concerning whom such publication is made, and proof of malice is not in such cases required beyond the proof of the publication itself. The justification, excuse, extenuation, if any, must be shown by defendant. Privileged communications, however, are an exception, and in such cases the plaintiff must show actual malice in order to maintain an action. *Newell*, 390.

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Malice is defined to be any corrupt or wrong motive of personal spite or ill-will. Fraser (3d ed.), 152, citing *Royal Aquarium Society v. Parkinson* (1892), 1 Q. B. 434; *Stuart v. Bell* (1891), 2 Q. B. 351.

Malice in law simply means a general wickedness of intent on the part of the person and depraved inclination to do harm, or to disregard the rights or safety of mankind generally. The existence of which sentiments is made manifest by mischievous or injurious acts on the part of him who entertains them. Flood, p. 32.

The word "malice," as a term of law, has a meaning somewhat different from that which it possesses in ordinary parlance. In its ordinary sense, "malice" denotes ill-will, a sentiment of hate or spite, especially when harbored by one person toward another. The word is so employed in the well-known sentence in the litany of the Church of England, "From envy, hatred, and malice," etc. This is what the law terms "malice in fact," "actual" or "personal" malice, to distinguish it from the legal sense attributed to the term, and which, from being used in such a sense, is accordingly designated "malice in law." "Malice in fact" is, to use the language of a late eminent judge, "of two kinds — either personal malice against an individual, or that sort of general violation of the right consideration due to all mankind which may not be personally directed against any one." And Lord Justice Brett, in a comparatively recent case, where a question of privilege arose, said: "By malice here I mean, not a pleading expression, but actual malice, or what is termed 'malice in fact;' i. e., a wrong feeling in the defendant's mind." Newell on Libel and Slander, p. 315.

Mr. Justice Stephens says of the word "malice:" "It seldom has any meaning except a misleading one. It refers not to intention, but to motive, and, in almost all legal inquiries, intention, as distinguished from motive, is the important matter."

Malice is essential to every action for libel. It has been sometimes divided into legal malice, or malice in law, and actual malice, or malice in fact. These terms might seem to imply that the two kinds of malice are different in their nature. The true distinction, however, is not in the malice itself, but simply in the evidence by which it is established. In all ordinary cases, if the charge or imputation complained of is injurious, and no justifiable motive for making it is apparent, malice is inferred from the falsity of the charge. The law, in such cases, does not impute malice not

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existing in fact, but presumes a malicious motive for making a charge which is both false and injurious when no other motive appears. Where, however, the circumstances show that the defendant may reasonably be supposed to have had a just and worthy motive for making the charge, then the law ceases to infer malice from the mere falsity of the charge, and requires from the plaintiff other proof of its existence. It is actual malice in either case; the proof only is different. *Lewis v. Chapman*, 16 N. Y. 372.

Where an article is libelous *per se*, and has been shown to be false, the jury may, in the absence of privilege, infer the existence of the express malice necessary to support an award of punitive damages from the simple fact of the publication of the article. *Brandt v. Morning Journal Assn.*, 81 App. Div. 183, 80 N. Y. Supp. 1002.

The malice of one defendant cannot be imputed to others without connecting proof. *Krug v. Pitass*, 162 N. Y. 154, reversing 16 App. Div. 480, 44 N. Y. Supp. 864.

## .SUBDIVISION 2.

## Malice in Law.

One meaning of malice is absence of legal excuse, this is the sense in which the term is most frequently employed. Substitute "absence of legal excuse" for "malice" in many of the opinions in the reports which are difficult to be understood and they will become easily intelligible. Townshend, 76.

Again malice in legal understanding implies no more than willfulness. Townshend, 79.

The lawful presumption is that publication, if false and libelous, was malicious. *Youmans v. Paine*, 86 Hun, 479, 35 N. Y. Supp. 50; *Van Alstyne v. Rochester Printing Co.*, 25 App. Div. 282, 49 N. Y. Supp. 523.

The unprivileged publication of matter libelous *per se* raises a presumption of malice. *Hartman v. Morning Journal Assn.*, 46 St. Rep. 181, 19 N. Y. Supp. 398, affirmed 138 N. Y. 638.

Malice is presumed in the publication of an article respecting a party which tends to expose him to contempt and ridicule. *O'Brien v. Bennett*, 72 App. Div. 367, 76 N. Y. Supp. 498.

Malice is an implication of law from the false and injurious nature of the charge. It is inferred from the fact of publication.

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If the publication is libelous upon its face malice is a conclusion of law. If the words uttered were not privileged the law implies malice. *Root v. King*, 7 Cow. 613, 4 Wend. 114; *Fry v. Bennett*, 5 Sandf. 54; *Washburn v. Cook*, 3 Den. 110; *Littlejohn v. Greeley*, 13 Abb. 41; *Byam v. Collins*, 111 N. Y. 143.

Malice may be inferred where a libel was recklessly published as well as where its publication is induced by personal ill-will. *Young v. Fox*, 26 App. Div. 261, 49 N. Y. Supp. 634.

Legal malice results from proof of the transaction which the law pronounces wrongful, and, therefore, malicious. *Howard v. Sexton*, 4 N. Y. 160.

Evidence of the falsity of the libelous publication is evidence of malice, and when defendant introduces evidence to show absence of actual malice, the existence of such malice becomes a question of fact for the jury. *Crane v. Bennett*, 77 App. Div. 102, 79 N. Y. Supp. 66.

Belief in the truth of a publication is not sufficient to relieve the responsibility of the publisher, or even to show good faith on his part. *Hartman v. Morning Journal Assn.*, 46 St. Rep. 181, 19 N. Y. Supp. 398, affirmed 138 N. Y. 638.

Where a publication is made in wanton or reckless disregard of the rights of plaintiff, malice is predicated thereon. *Shanks v. Stumpf*, 23 Misc. Rep. 264, 51 N. Y. Supp. 154.

In an action for libel or slander, though evidence may be given to increase damages, it is not essential. *Bromage v. Prosser*, 4 B. & C. 257; *Hargrave v. Le Breton*, 4 Burr. 2425.

The courts look at the effect of the publication not at the intent. *Haire v. Wilson*, 9 B. & C. 643; *Fisher v. Clement*, 10 B. & C. 472.

Even a finding that defendant had no malicious intent by the jury will not avail him; since defendant must be deemed to have intended the consequences naturally resulting from his words. *Wenden v. Ash*, 13 C. B. 845.

Malice so far as the law requires it to sustain an action is implied from the publication of that which is untrue. The law presuming it to exist in such case. Express malice is not required to sustain an action. *Littlejohn v. Greeley*, 13 Abb. 41.

It is no excuse that the publication was made accidentally or inadvertently, or with good motives or in an honest belief in its truth. *Moore v. Francis*, 121 N. Y. 199.

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## Malice in Fact.

Fraser (3d ed.) says, at page 155, citing authorities, that malice may be proved either by showing that defendant knew the words were untrue when he wrote or spoke them, or that they were uttered with the intention of injuring the plaintiff, or that the plaintiff and defendant were rivals and had previously quarreled, or that the defendant was actuated by personal resentment or any other wrong motive. It is even held that unnecessarily extensive publication of the words, or other unnecessary violence indicates malice. *Gerard v. Dickenson*, 4 Rep. 18; *Peacock v. Reynal*, 2 B. & G. 151; *Hooper v. Truscott*, 2 Scott, 672; *Gilpin v. Fowler*, 9 Exch. 615; *Rogers v. Clifton*, 3 Bos. & P. 587; *Jackson v. Hopperton*, 16 C. B. (N. S.) 829; *Wright v. Woodgate*, 2 C., M. & R. 578.

"Although a man may use excessive language, and yet have no malice in his mind." *Neville v. Fine Arts Insurance Co.* (1895), 2 Q. B. 170.

Express malice is when one with a sedate, deliberate mind, and formed design doth kill (or injure) another, which formed design is evidenced by external circumstances discovering that inward intention, as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him bodily (or other) harm. Newell on Libel and Slander, 317.

Proof of express malice is admissible to enhance damages. *Read v. Sweetzer*, 6 Abb. Pr. (N. S.) 9; *Frye v. Bennett*, 28 N. Y. 324.

Malice may be established by circumstances. *Cheritree v. Roggin*, 67 Barb. 124.

By declarations of defendant before the publication complained of. *Rosenwald v. Hammerstein*, 12 Daly, 377.

In an action for charging plaintiff with theft a threat by defendant to "follow this thing out if it costs \$100, to see you discharged," was held to be properly proven to show malice. *Wright v. Gregory*, 9 App. Div. 85, 41 N. Y. Supp. 139.

The admission in evidence of statements showing ill-will toward plaintiff, made several years before the alleged libel, by one of the defendants, who did not know of the article until after its publication, which statements had not been heard by, or com-

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municated to, the other defendants before the publication, is reversible error, as the general malice proved thereby did not cause or prompt the publication. *Krug v. Pitass*, 162 N. Y. 154, reversing 16 App. Div. 480, 44 N. Y. Supp. 864.

Other articles written by the same person containing reference to plaintiff, showing that he had easy means of ascertaining the truth, may be shown. *Morrison v. Press Publishing Co.*, 38 St. Rep. 357.

Reiteration of the libel stating that an action had been threatened and a retraction demanded may be shown on the question of malice. *Ward v. Deane*, 32 St. Rep. 270.

Plaintiff may show a repetition of the slanderous charge for the purpose of showing malice by way of enhancing the damages. *Root v. Lowndes*, 6 Hill, 518; *Inman v. Foster*, 8 Wend. 602; *Titus v. Sumner*, 44 N. Y. 266; *Bassell v. Elmore*, 48 N. Y. 561; *Johnson v. Brown*, 57 N. Y. 118; *Distin v. Rose*, 7 Hun, 83. See *Fowles v. Bowen*, 30 N. Y. 20; *Frazier v. McCloskey*, 60 N. Y. 337; *Flanders v. Groff*, 25 Hun, 553.

But plaintiff is not entitled to prove previous utterances other than the one complained of, or the publication of prior libels, actions for which are not barred by the statute of limitations. *Doyle v. Levy*, 89 Hun, 350, 69 St. Rep. 798, 35 N. Y. Supp. 434.

Evidence of words of a different import on another occasion are not admissible. *Howards v. Sexton*, 4 N. Y. 157.

Nor does speaking of other slanderous words after action brought, which may be the subject of another suit. *Frazier v. McCloskey*, 60 N. Y. 337.

What was said by defendant at the time of directing the publication is evidence to disprove actual malice upon the question of damages. *Taylor v. Church*, 8 N. Y. 452.

Evidence of circumstances tending to disprove malice is not admissible in the absence of proof that defendants had knowledge of such circumstances at the time of the publication. *Morey v. Morning Journal Assn.*, 17 St. Rep. 266, 1 N. Y. Supp. 475.

Privileged communications are protected from the presumption of malice usually to be inferred. When it appears that the party had just occasion for speaking the words deemed slanderous, malice is not to be presumed and additional evidence is necessary to establish the charge. Presumption of malice being rebutted by the privilege, plaintiff must show that defendant was influenced by motives other than the mere discharge of duty, and evi-

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dence that the statement was false is not sufficient to raise the presumption of malice. *Ormsby v. Douglas*, 37 N. Y. 477, citing *Howard v. Thompson*, 21 Wend. 319.

Where a communication is privileged, the question of good faith in its publication, actual malice as distinguished from malice presumed from publication, and also belief in the truth of the statement are matters for the jury. The question for the jury is whether the circumstances of the allegation were such as to repel the legal inference of malice, and throw upon the plaintiff the burden of offering evidence of its existence beyond the falsity of the charge. Privileged communications are the exception to the general rule as to malice, and the burden rests on the plaintiff to show that such communications are within the exception. *Mat-tice v. Wilcox*, 147 N. Y. 624, citing *Lewis v. Chapman*, 16 N. Y. 369 (373); *Byam v. Collins*, 111 N. Y. 143; *Hamilton v. Eno*, 81 N. Y. 116.

If the publication is privileged plaintiff must show express malice, but only in such case. *Neil v. Fords, Howard & Hulbert*, 72 Hun, 12, 55 St. Rep. 74, 25 N. Y. Supp. 406; *Youmans v. Paine*, 86 Hun, 479, 69 St. Rep. 473, 35 N. Y. Supp. 50.

It is not the duty of the plaintiff to give evidence of the falsity of the libel in the first instance except in the case of a qualifiedly privileged communication when malice is a necessary ingredient of the cause of action, and evidence of the falsity of the defamatory cause of action may be given to defeat the privilege. *Remsen v. Bryant*, 24 Misc. Rep. 238, 52 N. Y. Supp. 515, distinguishing *Samuels v. Evening Mail Assn.*, 75 N. Y. 604; *McFadden v. Morning Journal Assn.*, 28 App. Div. 508, 51 N. Y. Supp. 275.

Where the communication alleged to be libelous is privileged the court will not imply malice from the mere fact of the publication, and without proof of malice, express or implied, there can be no recovery. *Ginsberg v. Union Surety & Guaranty Co.*, 68 App. Div. 141, 74 N. Y. Supp. 561.

The privilege accorded to journalists and regular correspondents, in writing and commenting upon current affairs, is not a defense if it appears that such privilege has been used as a means of gratifying malice. *Hart v. Townsend*, 67 How. Pr. 88.

In an action for libel it is competent to prove as against a newspaper corporation the ill-will or malice of the reporter who wrote

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the article for the purpose of recovering punitive damages. *Clifford v. Press Publishing Co.*, 78 App. Div. 79, 79 N. Y. Supp. 767.

For further authorities bearing on the question of malice, see "Evidence" and "Privileged Communications."

**ARTICLE IX.****DEFENSES.**

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**SUBDIVISION 1.****Justification.**

It is a good defense to an action for libel and slander that the words are true in substance and in fact. *Fraser on Libel and Slander* (3d ed.), 82.

The publication of the truth is, as to a civil action, absolutely privileged. *Townshend on Libel*, 327.

In all civil actions for libel and slander the truth of the publication is a complete defense. 18 Am. & Eng. Encyc. of Law (2d ed.), 1067.

In civil actions, and against a party coming into a court of justice on a claim for damages, it has long been the rule of common law that the truth of the facts imputed constituting the slanderous or libelous charge may be pleaded by way of justification, and if proved, constitute a good bar to the action. In such case, of course, the motive and purpose are immaterial and cannot be the subject of inquiry. The rule proceeds upon the principle that whatever is the motive, if the charge against the individual suing is true, if he is in fact guilty of the crime or disgraceful conduct imputed to him, he has sustained no damage for which he can claim redress in a court of justice. *Newell*, 795.

In civil actions where the truth of the alleged libel is pleaded in justification, it may be proved as a complete bar to the suit, and in such action the motives with which the publication was made are not material. *Joannes v. Jennings*, 6 T. & C. 138,



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citing *Root v. King*, 7 Cow. 613, s. o., 4 Wend. 113; *Baum v. Clause*, 5 Hill, 196, where it is said, "Our laws allow a man to speak the truth, although it be done maliciously."

The defendant may prove the truth of the charge, notwithstanding that the plaintiff has received a pardon for the matter on which the statement is based. *Baum v. Clause*, 5 Hill, 196.

While the truth of a libel is a complete defense it must be pleaded either in justification or in mitigation. *Roeber v. New York Staats Zeitung*, 1 App. Div. 427, 37 N. Y. Supp. 255.

Where the truth is pleaded as a justification, it may be proven as a complete bar to the action. *Joannes v. Jennings*, 6 T. & C. 138; *George v. Jennings*, 4 Hun, 66.

The justification, however, must be as broad as the charge, and of the very charge attempted to be justified. *Townshend*, 332; *Bissell v. Cornell*, 24 Wend. 354; *Stilwell v. Barter*, 19 Wend. 478; *Fidler v. Delevan*, 20 Wend. 57; *Powers v. Skinner*, 1 Wend. 451; *Cooper v. Barber*, 24 Wend. 105; *McKinly v. Rob*, 20 Johns. 351; *Ormsby v. Douglass*, 2 Abb. Pr. 407; *Herr v. Bamberg*, 10 How. Pr. 128; *Fletcher v. Jones*, 64 Hun, 274, 19 N. Y. Supp. 47; *Jaycocks v. Ayres*, 7 How. 215; *Loveland v. Hosmer*, 8 How. 215; *Hathorn v. Congress Spring Co.*, 44 Hun, 608; *Baldwin v. Genung*, 74 N. Y. Supp. 835; *Lanpher v. Clark*, 77 Hun, 506, 29 N. Y. Supp. 107.

The truth of the statement to constitute a defense must be substantially made out in its entirety, though justification need not be identical in letter and form. *Miller v. Donovan*, 16 Misc. Rep. 453, 39 N. Y. Supp. 820. See also *Huff v. Bennett*, 6 N. Y. 337; *Daly v. Byrne*, 1 Abb. N. C. 150.

The general rule that the justification must be as broad as the libel charged is reiterated in *Brush v. Blot*, 16 App. Div. 80, 44 N. Y. Supp. 1073; *Young v. Fox*, 26 App. Div. 268, 49 N. Y. Supp. 634; *Morse v. Press Pub. Co.*, 49 App. Div. 375, 63 N. Y. Supp. 423.

A pleading of justification which relates to portions only of the publication, and which is not pleaded as a partial defense or in mitigation, is not sufficient. *Sawyer v. Bennett*, 49 St. Rep. 774.

But the rule of pleading that the justification shall be as broad as the charge does not mean that in answering justification must be broad enough to embrace every slanderous charge contained in the complaint. When several separate and distinct things are

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charged the defendant may justify as to one, though he fails as to the others. *Lanpher v. Clark*, 149 N. Y. 472; *Holmes v. Jones*, 121 N. Y. 461.

In the following cases it was held that the justification was not sufficiently broad to constitute a defense: *Blocks v. Bemis*, 8 Johns. 455; *Genet v. Mitchell*, 7 Johns. 120; *Riggs v. Deniston*, 3 Johns. Cas. 198; *Littlejohn v. Greeley*, 13 Abb. Pr. 41; *Loveland v. Hosmer*, 8 How. 215; *Tobin v. Sykes*, 71 Hun, 469, 24 N. Y. Supp. 943; *Jasper v. Press Pub. Co.*, 76 Hun, 64, 27 N. Y. Supp. 619, affirmed 149 N. Y. 612; *Palmer v. Haight*, 2 Barb. 210; *Andrews v. Vanduzer*, 11 Johns. 38; *Morse v. Press Pub. Co.*, 49 App. Div. 375, 63 N. Y. Supp. 423.

The plaintiff can never properly be permitted to give evidence of the falsity of the defamatory matter unless in rebuttal of evidence of its truth. *Remsen v. Bryant*, 24 Misc. Rep. 238, 52 N. Y. Supp. 515, citing *Prince v. Brooklyn Eagle*, 16 Misc. Rep. 186, 37 N. Y. Supp. 250; *Ullrich v. N. Y. Press Co.*, 23 Misc. Rep. 168, 50 N. Y. Supp. 788; *Shanks v. Stumpf*, 23 Misc. Rep. 264, 51 N. Y. Supp. 154; *Cady v. Brooklyn Union Pub. Co.*, 23 Misc. Rep. 409, 51 N. Y. Supp. 198. But see *Stafford v. Morning Journal*, 68 Hun, 467, 22 N. Y. Supp. 1008.

The burden of proving facts constituting justification is upon the defendant. *Clemens v. Mellon*, 27 App. Div. 349, 49 N. Y. Supp. 1129.

It is no defense by way of justification that the charge was made upon information received from others. *Heyler v. N. Y. News Pub. Co.*, 71 Hun, 4, 24 N. Y. Supp. 499, affirmed without opinion 148 N. Y. 734. See *Maeske v. Smith*, 35 St. Rep. 541, 12 N. Y. Supp. 423; *Ryer v. Fireman's Journal Co.*, 11 Daly, 251; *Skinner v. Powers*, 1 Wend. 451; *Inman v. Foster*, 8 Wend. 602; *Van Benschotten v. Yapple*, 13 How. 97.

A plea of justification precludes defendant from claiming that the publication was an act of his agent only. *Youmans v. Paine*, 86 Hun, 479, reversed 153 N. Y. 214.

In order to justify a charge of perjury the evidence must be such as would be sufficient to convict the plaintiff on an indictment for perjury. *Woodbeck v. Keller*, 6 Cow. 118; *Clark v. Dibble*, 16 Wend. 601. But see *Hopkins v. Smith*, 3 Barb. 599.

The provision of section 8, article 1 of the Constitution referring to libel that "if it shall appear to the jury that the matter charged

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as libelous is true, and was published with good motives, and for justifiable ends, the parties shall be acquitted," applies only to criminal prosecution. *George v. Jennings*, 4 Hun, 66.

The defense of justification is more fully considered under Pleading, Art. XI, and Evidence, Art. XII, Subd. 3.

**SUBDIVISION 2.****Mitigation.**

By section 535 of the Code it is provided that in an action for libel or slander the defendant may prove mitigating circumstances notwithstanding that he has pleaded and attempted to prove justification. What constitutes such proof is defined by section 536.

Mitigating circumstances are such as tend to show the absence of malice, although not tending to prove the truth of the charge. *Newell*, 889.

Evidence in mitigation must consist of those circumstances which, while not arising to the dignity of a justification of the charge as true, yet do in an appreciable degree tend toward that end, and thus permit of the inference that the defendant was not actuated by malice in publishing the libel. They must be of such a nature as to show that the defendant, though mistaken, believed the charge to be true when it was made. The mitigating facts must be connected or bear upon the defamatory matter. *Mattice v. Wilcox*, 147 N. Y. 624, citing *Bush v. Prosser*, 11 N. Y. 347; *Hamilton v. Eno*, 81 N. Y. 106; *Bisbey v. Shaw*, 12 N. Y. 67. Cited in turn in *Gray v. Brooklyn Union Publishing Co.*, 35 App. Div. 286, 55 N. Y. Supp. 35.

Mitigating circumstances, under the old system when justification was set up, could not be proved because they did not amount to a justification. *Mattice v. Wilcox*, 147 N. Y. 634, citing *Bush v. Prosser*, 11 N. Y. 347; *Bisbey v. Shaw*, 12 N. Y. 67.

The latter case states that the Code has changed the law in this respect, and that the defendant may now allege the truth of the charge in justification, and also facts tending to prove the truth in mitigation of damages, and although the evidence fails to prove justification he is entitled to have it submitted to the jury on mitigation of damages.

Matter by way of mitigation must be such as tends to furnish some excuse for publishing the libel complained of. *Hess v.*

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*New York Press Co.*, 26 App. Div. 73, 49 N. Y. Supp. 894, citing *Hartman v. Morning Journal Association*, 46 St. Rep. 184, 19 N. Y. Supp. 398; *Hagar v. Tibbits*, 2 Abb. Pr. (N. S.) 102, to the point that a party cannot shelter himself against the consequences of the alleged slander by proof that he had information as to the fact from another, and that mere belief in the truth of the statement is not sufficient to constitute good faith, and is not admissible in mitigation.

The same rule is laid down in *Shanks v. Stumpf*, 23 Misc. Rep. 264, 51 N. Y. Supp. 154, holding also that a mere general averment of the truth of the libel does not amount to a defense either by way of justification or mitigation, unless in a case where a libel itself consists of a specific statement of facts, citing *Wachter v. Quenzer*, 29 N. Y. 547; *McKane v. Brooklyn Citizen*, 53 Hun, 132, 6 N. Y. Supp. 171; *Kingsley v. Kingsley*, 79 Hun, 569, 29 N. Y. Supp. 921; *Lanpher v. Clark*, 149 N. Y. 471.

Evidence in mitigation extends only to punitive damages, and has no bearing upon compensatory damages. *Young v. Fox*, 26 App. Div. 261, 49 N. Y. Supp. 634; *Wuensch v. Morning Journal Assn.*, 4 App. Div. 110 (115), 38 N. Y. Supp. 605.

Matter in mitigation operates only to prevent the recovery to exemplary damages, but is not effectual to reduce the amount of damages actually sustained. *Hartman v. Morning Journal Assn.*, 46 St. Rep. 181, 19 N. Y. Supp. 398.

While it may be shown in mitigation of damages that the libelous paragraph was copied from a newspaper, and hence believed to be true, it may not be shown that other journals published the same statement simultaneously or subsequent to the publication complained of, or that the alleged libel appeared in another newspaper from which plaintiff has already recovered damages. *Palmer v. Matthews*, 162 N. Y. 100 (103), citing numerous authorities.

In *Remsen v. Bryant*, 24 Misc. Rep. 238, 52 N. Y. Supp. 515, it is said that malice has nothing to do with the question whether the plaintiff shall recover actual damages in actions of slander or libel, but only with the question as to whether "smart" money shall be added.

The promulgation of rules issued by the defendant to his employees is not competent in mitigation of damages. *O'Brien v. Bennett*, 59 App. Div. 623, 69 N. Y. Supp. 298; *McMahon v.*

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*Bennett*, 31 App. Div. 16, 52 N. Y. Supp. 390; *Morgan v. Bennett*, 44 App. Div. 323, 60 N. Y. Supp. 619.

It was said in *Bisbey v. Shaw*, 12 N. Y. 67, that by enabling defendant to place his defense of mitigation on the record, the technical objection of surprise is removed upon which that defense was formerly excluded and by the rule authorizing defendant to couple the defense of mitigation with justification, defendant is able to avail himself of either one or the other according to proof.

The language of the court in *Klinck v. Colby*, 46 N. Y. 427, that "in an action for libel, where under an answer proper to the end, the defendant has shown that the communication was privileged, his further answer of justification of the truth of the charge, though without proof given to sustain it, may not be taken into consideration of evidence of malice, and in aggravation of damages" is considered and explained in *Cruikshank v. Gordon*, 118 N. Y. 178 (185), referring to *Distin v. Rose*, 69 N. Y. 122, the court holding per Follett, Ch. J., that the authorization of pleas in mitigation is not a license for their interposition in bad faith and for the purpose of injuring the reputation of the plaintiff, and that when they are interposed for that purpose the fact may be considered by the jury.

These authorities were followed by *Holmes v. Jones*, 121 N. Y. 461, where a charge that if the plaintiff fail to establish the justification set up in his answer, a jury could determine whether it was set up in good or bad faith, and if they believe it was set up in bad faith, they could consider it in estimating damages, was held to be no error upon the authority of the cases cited above.

The rule as now laid down by the courts as to matter in mitigation is that it must be of such a nature as to show that defendant, though mistaken, believed the charge to be true when it was made. Thus permitting an inference that defendant was not actuated by malice. It must be connected with or bear upon the defamatory charge. *Mattice v. Wilcox*, 147 N. Y. 624 (634); *Gray v. Brooklyn Union Publish. Co.*, 35 App. Div. 286 (288), 55 N. Y. Supp. 35.

The general character of the plaintiff may be shown in mitigation of damages, but no mere reports or rumors, not amounting to proof of general character, nor information obtained by the defendant from others as to the truth of the charge, unless accom-

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panied by proof that such information is true, can be received for the purpose of rebutting the presumption of malice. Facts and circumstances which tend to disprove malice by showing that the defendant, though mistaken, believed the charge to be true when it was made, may be given in evidence in mitigation of damages. *Hatfield v. Lasher*, 81 N. Y. 246, citing *Bush v. Prosser*, 11 N. Y. 347; *Bisbey v. Shaw*, 12 N. Y. 67. It is said in *Hatfield v. Lasher*, *supra*, that it was formerly held that evidence was admissible that there are reports abroad that the plaintiff was guilty of practices like those charged, but it is said that this is not the rule in this State. Citing *Root v. King*, 7 Cow. 629; *Gilman v. Lowell*, 8 Wend. 579.

In *Willover v. Hill*, 72 N. Y. 36, it was held that evidence was admissible by defendant showing the repetition of what he had heard, but that it could only be given by showing that the reports were brought to the defendant's attention before utterance of the slanderous words.

It is not a legal excuse that a newspaper publishes defamatory matter accidentally or inadvertently or with good motives and in an honest belief of its truth. *Moore v. Francis*, 121 N. Y. 199.

An answer setting up that the defendant made the publication at the request, and on the information, of third persons, was held to be not a mitigating circumstance in *Hager v. Tibbitts*, 2 Abb. Pr. (N. S.) 97. This case does not appear to have been subsequently cited.

The same rule was held in *Purple v. Horton*, 13 Wend. 9, although it was held in *Skinner v. Powers*, 1 Wend. 451, that, where an article was the publication of rumors affecting plaintiff, defendant might show in mitigation that such rumors really existed.

Where there is a partial justification, it is error to instruct the jury that the action is wholly undefended, since a partial justification may be considered in mitigation. *Bennet v. Smith*, 23 Hun, 50.

That others had published the libel, which fact was unknown to the defendant when the publication complained of was made, or that actions had been commenced against others for the publication, is inadmissible in mitigation. *Palmer v. Matthews*, 162 N. Y. 100.

Facts occurring after the publication of the libel are not competent in mitigation. *Hatfield v. Lasher*, 81 N. Y. 247, cited in

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*Grant v. Herald Co.*, 42 App. Div. 354, 59 N. Y. Supp. 84; *Wuensch v. Morning Journal Assn.*, 4 App. Div. 110, 38 N. Y. Supp. 605; *Gray v. Brooklyn Union Pub. Co.*, 35 App. Div. 286, 55 N. Y. Supp. 35.

Only such matters are competent in mitigation of damages as are known to the defendant before or at the time of uttering the slanderous words. *Lanpher v. Clark*, 77 Hun, 506, 29 N. Y. Supp. 107.

It may be shown in mitigation that the plaintiff had been improvident in the discharge of his duties as administrator. *Hart v. Sun Printing & Pub. Assn.*, 79 Hun, 358, 29 N. Y. Supp. 434.

Or that the defendant's barns were destroyed on a certain date by an incendiary fire, and that the plaintiff had a motive for burning the barns. *Warner v. Southall*, 31 App. Div. 376, 52 N. Y. Supp. 320.

It seems that where an action for libel is commenced without any request from the plaintiff for a retraction of the charge, and the defendant thereafter publishes a fair and full retraction, this may be proved in mitigation of damages before the jury. But the mere offer to publish a retraction cannot be shown. *Turton v. New York Recorder Co.*, 144 N. Y. 144.

The defendant may show the receipt of communications of similar purport from third persons before uttering the slanderous words, which he believed to be true. *Lally v. Emery*, 79 Hun, 560, 29 N. Y. Supp. 888.

In mitigation, defendant may show facts tending to establish truth of the charge. *Putnam v. Press Pub. Co.*, 46 App. Div. 600, 62 N. Y. Supp. 110; *Feeley v. Jones*, 79 Hun, 18, 29 N. Y. Supp. 446; *Roeber v. New Yorker Staats Zeitung*, 1 App. Div. 427, 37 N. Y. Supp. 255, 2 App. Div. 163, 37 N. Y. Supp. 719; *Lawson v. Morning Journal Assn.*, 32 App. Div. 71, 52 N. Y. Supp. 484.

Publication with good motive may be alleged by way of mitigation. *Jeffras v. McKillop & Sprague*, 2 Hun, 351, 4 S. C. 578.

That words were spoken in the heat of passion, not intended to be slanderous in meaning, may be considered in mitigation. *Courtney v. Mannheim*, 39 St. Rep. 125, 14 N. Y. Supp. 929.

Plea in mitigation, and the evidence which may be given in mitigation of damages, are considered more fully under the heads of "Pleading" and "Evidence," respectively.

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## SUBDIVISION 3.

## Privileged Communications.

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§ 1. **Privilege defined and classified.**—In some cases the occasion of a publication which would be otherwise libelous or slanderous is, by reason of convenience and in the interests of society, excusable, and, therefore, termed a privileged communication. Such an occasion rebuts the inference of malice ordinarily arising from a statement prejudicial to the character of plaintiff, and places on plaintiff the burden of showing that the publication was malicious. To entitle a communication to be privileged, it must be made in good faith upon a subject in which the party now has an interest, or believes he had an interest. It is a defense to an action for libel or slander to prove that the circumstances under which the defamatory words were published were such as to entitle the defendant to state what he honestly believes, and, even though the statement may be proved or admitted to be false, still its publication does not afford ground for acting by reason of its being privileged. In many cases there must be a legal immunity for free speaking, unjust would it seem were it otherwise, and that that duty offers a responsibility to speak openly and fearlessly. The reasons for giving a person protection are, however, not the same in all cases. In some they are termed “absolute,” or “conclusive,” and in others the privilege is a conditional one, and they have been thus specified by the authorities, although, in the cases classified as “absolute privilege,” there are limitations which would seem to render the use of the term “absolute” in most cases relative in contradistinction to “conditional” privilege, rather than to denote the absolute right on the part of the person to speak or write as he deems fit and proper. Newell, 389; Odgers, 181; 18 Am. & Eng. Encyc. of Law, 1023; Cooley on Torts, 210.

The doctrine of privileged communications is only a special example of a great law of privilege pertaining to human affairs



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generally, to wit, the right to inflict harm upon another in just so far as may reasonably be deemed necessary for one's own protection, or for the protection of another, where that is proper. So far others must yield, or the vindication of rights in many cases would be an empty name; but further no one is required to give way. Bigelow on Torts, 164, 165.

A privileged communication is one made in good faith upon any subject-matter in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty to the person having a corresponding interest or duty, and which contains matter which, without the occasion upon which it is made, would be defamatory and actionable. In other words, the occasion on which the communication was made rebuts the inference of malice *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts upon the plaintiff the burden of proving actual malice. Newell, 388, citing Flood, 208.

In certain cases, even though the matter complained of is defamatory, in the interests of public policy no liability attaches to the publication thereof; in other words, the occasion is privileged. Fraser, 99.

Although the theory of the law seems to rest entirely upon natural presumption of intention, it is pretty clear that, in determining the limits of privilege, the courts have been almost wholly guided by considerations of public or general expediency. Encyclopædia Britannica, 505.

Malice in relation to a privileged occasion is defined in *Royal Aquarium Soc. v. Parkinson* (1892), 1 Q. B. 434, as follows: "The question is whether the defendant is using the occasion honestly or abusing it. If a person, on such an occasion, states what he knows to be untrue, no one ever doubted he would be abusing the occasion." Again, the occasion must be made use of *bona fide* and without malice; he is not entitled to the protection of the privilege if he uses the occasion for some indirect or wrong motive.

The description of cases recognized as privileged communications must be understood as exceptions to the general rule, by which, in case of a libelous publication, the law implies malice and infers some damage, as being founded upon some apparently recognized obligation or motive, legal, social, or moral, which may fairly be presumed to have led to the publication, and, therefore, *prima facie* relieves it from that just implication from which the general

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law is deduced. *White v. Nichols*, 3 How. (U. S.) 266 (291), cited *Byam v. Collins*, 111 N. Y. 143 (150).

The language of Lord Campbell, in *Harrison v. Bush*, 5 Ellis & Bl., 2 B. 344 cited in *Van Wyck v. Aspinwall*, 17 N. Y. 193, and again in *Byam v. Collins*, 111 N. Y. 150, opinion Earl, J., defines a class of privilege as follows: "A communication made *bona fide* upon any subject-matter in which the party communicating has an *interest*, or in reference to which he has a *duty*, is privileged if made to a person having a corresponding *interest* or *duty*, although it contained incriminating matter which, without this privilege, would be slanderous and actionable, and this though the duty be not a legal one, but only a moral or social duty of imperfect obligation." Judge Earl adds that this statement has been generally approved by judges and text-writers since, and further cites *Toogood v. Spyring*, 1 Cr., M. & R. Exch. 181, where it was said that the law considered a libelous "publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interests are concerned." Adding that this statement of the rule was approved by Folger, J., in *Klinch v. Colby*, 46 N. Y. 427, and *Hamilton v. Eno*, 81 N. Y. 116.

A privileged communication is defined by the Penal Code as follows:

"§ 253. *Privileged communications*.—A communication made to a person entitled to, or interested in, the communication, by one who was also interested in or entitled to make it, or who stood in such a relation to the former as to afford a reasonable ground for supposing his motive innocent, is presumed not to be malicious, and is called a privileged communication."

A privileged communication may be defined to be a statement or charge defamatory to the character of another, but made under such circumstances as to rebut a legal inference of malice. *Hemmens v. Nelson*, 138 N. Y. 517 (529).

The distinction between a privileged communication and another is pointed out in *Buddington v. Davis*, 6 How. Pr. 401, where it is said that the difference consists in the proof necessary to sustain the action; that, when the communication is not privileged, malice will be inferred from the character of the imputation, but when the communication is privileged good faith must

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be shown and the plaintiff must show that the defendant, when making it, was governed by bad motives.

Privileged communications are protected from the presumption of malice usually to be inferred. When it appears that the party had just occasion for speaking the words deemed slanderous, malice is not to be presumed, and additional evidence is necessary to establish the charge. Presumption of malice being rebutted by the privilege, plaintiff must show that defendant was influenced by motives other than the mere discharge of duty, and evidence that the statement was false is not sufficient to raise the presumption of malice. *Ormsbee v. Douglas*, 37 N. Y. 477, citing *Howard v. Thompson*, 21 Wend. 319.

It is a well-settled rule that, where the defamatory statement or charge is shown to have been privileged, the burden of showing actual malice is cast upon the plaintiff, and such burden is not met by simply showing that the charge was false. *Stevenson v. Ward*, 48 App. Div. 291, 62 N. Y. Supp. 717, citing *McCarty v. Lambley*, 20 App. Div. 264, 46 N. Y. Supp. 792; *Hemmens v. Nelson*, 138 N. Y. 517.

The malice required to deprive a communication of the protection arising out of the occasion of the publication must be such as to induce the court, or any reasonable person, to draw the inference that the occasion has been taken advantage of to give utterance to an unfounded charge. *Townshend on Slander and Libel*, 321, citing *Manby v. Witt*, 18 C. B. 544.

The term "privileged," as applied to a communication alleged to be libelous, means simply that the circumstances under which it was made were such as to repel the legal inference of malice, and to throw upon the plaintiff the burden of offering some evidence of its existence beyond the mere falsity of the charge. "When a communication is made, in confidence, either by or to a person interested in the communication, supposing it to be true, or by way of admonition or advice, it seems to be a general rule that malice (*i. e.*, express malice) is essential to the maintenance of the action" (1 Starkie on Slander, 321). "But, whatever may be the true doctrine on this subject, there is no doubt that, where the communication is made *bona fide*, in answer to inquiries from one having an interest in the information sought, or where the relation between the parties by whom and to whom the communication is made is such as to render it reasonable and proper that

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the information should be given, it will be regarded as privileged. All that is necessary to entitle such communications to be regarded as privileged is that the relation of the parties be such as to afford reasonable ground for supposing an innocent motive for giving the information, and to deprive the act of an appearance of officious intermeddling with the affairs of others." *Lewis v. Herrick & Chapman*, 16 N. Y. 373, 374, 375.

"To this class of cases belong complaints preferred in the proper quarter against public officers; statements in regard to the character of a servant, given by a master upon inquiry; confidential communications upon matters of business, between parties having a mutual interest; statements made in the discharge of a public or official duty, and other publications of a similar nature. The occasion of the speech or writing, and the position of the person by whom it is uttered, in these instances, repel the presumption or inference of malice, which the law justly and wisely attaches to a false and injurious accusation where it is gratuitously made. But the party injured may nevertheless prove, if he is able to do so, that the charge which has been published, even upon such an occasion, was not only false in fact, but malicious in motive. If he can establish express malice, he may recover as in other cases, notwithstanding the conditional privilege. (See *Thorn v. Blanchard*, 5 Johns. 508; *O'Donaghue v. McGovern*, 23 Wend. 26; *Vanderzee v. McGregor*, 12 Wend. 545; *Somerville v. Hawkins*, 3 Eng. L. & Eq. 503; *Harrison v. Bush*, 32 Eng. L. & Eq. 173; *Van Wyck v. Aspinwall*, 17 N. Y. 190; *Lewis v. Chapman*, 16 N. Y. 369.)" *Perkins v. Mitchell*, 31 Barb. 467.

The question of privilege is for the court, as to whether there was a malice is for the jury. Newell 391; Fraser, 101, citing *Pullman v. Hill* (1891), 4 Q. B. 529.

The question as to when a defamatory article is privileged is in the first instance one of law. If the court holds a communication privileged, the question of the good faith in its publication, of actual malice, as distinguished from that which is presumed from a defamatory publication, and also belief in the truth of the statement, are all matters for the consideration of the jury. The court is to first judge as to the claim of a privileged communication and the question is whether the circumstances were such as to repel the legal inference of malice, and throw upon the plaintiff the burden of offering evidence of its existence beyond the

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mere falsity of the charge. *Mattice v. Wilcox*, 147 N. Y. 624 (636), citing *Klinck v. Colby*, 46 N. Y. 427; *Hamilton v. Eno*, 81 N. Y. 116; *Lewis v. Chapman*, 16 N. Y. 369.

Whether a libelous communication is privileged is a question of law, and when held as matter of law to be privileged, the burden rests upon the plaintiff to establish as matter of fact that it was maliciously made; this matter of fact is for the determination of the jury. *Byam v. Collins*, 111 N. Y. 150.

Whether a communication is privileged is a question of law for the court. *Hart v. Sun Print. & Publish. Assn.*, 79 Hun, 358, 29 N. Y. Supp. 434; *Lovell Co. v. Houghton*, 116 N. Y. 520.

When a communication is shown to be privileged the presumption is that it was made in good faith, the falsity of the charge and malice must be shown in order to maintain the action. Question of actual malice is for the jury. *Lathrop v. Hyde*, 25 Wend. 448; *Clapp v. Devlin*, 3 J. & S. 170; *Liddle v. Hodges*, 2 Bosw. 537; *Decker v. Gaylord*, 35 Hun, 584; *Fowles v. Bowen*, 30 N. Y. 20; *Ormsbee v. Douglas*, 37 N. Y. 477.

Privileged communications are classified in *White v. Nicholls*, 3 How. (U. S.) 266 (286), as follows: Whenever the author and publisher of the alleged slander acted in the *bona fide* discharge of a public or private duty, legal or moral; or in the prosecution of his own rights or interests. For example, words spoken in confidence and friendship, as a caution; or a letter written confidentially to persons who employed as a solicitor, conveying charges injurious to his professional character in the management of certain concerns which they had intrusted to him, and in which the writer of the letter was also interested. 2. Anything said or written by a master in giving the character of a servant who has been in his employment. 3. Words used in the course of a legal or judicial proceeding, however hard they may bear upon the party of whom they are used. 4. Publications duly made in the ordinary mode of parliamentary proceeding, as a petition printed and delivered to the members of a committee appointed by the House of Commons to hear and examine grievances."

It is said in *Perkins v. Mitchell*, 31 Barb. 461: "The authorities both in England and in the courts of this State clearly recognize two classes of privileged communications." The distinction is also recognized, although not distinctly stated in *How-*

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*ard v. Thompson*, 21 Wend. 319; *O'Donaghue v. McGovern*, 23 Wend. 26.

There are two classes of privileged communications: (1) Those which are absolutely privileged, and for the publication of which an action cannot be maintained, no matter what the motive of the author may be. Within this class are accurate publications of the proceedings of courts of record and legislative bodies, the statements of judges, witnesses, and jurors made on trials in courts of record. (2) Communications which are *prima facie* privileged. Among this class are statements necessary to protect one's private interests, and statements of one having an interest in the subject-matter of the communication made to another having an interest in the same matter. *Prima facie* privileged communications are subdivided into two kinds: (1) Those which relate to matters of public interest, and (2) those which relate to purely private interests. *Hill v. Durham House-Drainage Co.*, 79 Hun, 335, 29 N. Y. Supp. 427.

Chancellor Walworth, in *Hastings v. Lusk*, 22 Wend. 410, recognizes and points out two classes of privileged communications, citing numerous authorities, stating that in the one class of absolute privilege only words spoken by members of legislative bodies in discharge of their official duties, complaints made to grand jurors and magistrates, privilege of counsel in advocating the causes of their clients and parties conducting their own cases, where they confine themselves to what was relevant and pertinent to the question before the court; and in the other class, where the law does not impute malice to defendant from the mere fact of his having spoken the words, but plaintiff may be able to sustain the action if he can satisfy the jury there was actual malice, conforming substantially, so far as the discussion goes, to the class of cases laid down by the text-writers.

Privileged communications are those absolutely privileged and *prima facie* privileged. The first imports that the privilege cannot be overturned by evidence that the publication was made with malice; *prima facie* privilege that the privilege may be overturned by such evidence. Bigelow, 165.

Townshend on Slander, §§ 120-208, calls attention to the fact that in text-books and reports there is much discussion as to privileged communications, and accepts the division into those absolutely privileged and conditionally privileged, giving

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as the definition of the privileged "publication," which term he prefers to "communication," "one when the occasion really or apparently furnishes a legal excuse therefor."

Privileged communications are divided by text-writers as matter of convenience into two classes; first, those classified under the term "absolute privilege," said to be founded on public policy and to be confined within narrow limits based upon the ground "that it is advantageous for the public interest that persons should not in any way be fettered in their statements." Second, the class known as "qualified privilege." In this class of cases privilege is not absolute but qualified only, and a recovery may be had in spite of the privilege, if plaintiff is able to show that the words were used not in good faith, but that the defendant availed himself of the occasion willfully to defame the plaintiff. There is no presumption of malice in such cases, but the defendant is responsible if both falsehood and malice appear affirmatively. Odgers, 181; Newell, 389; 18 Encyc. of Law, 1029; Cooley, 211.

§ 2. **Absolute privilege.**—Townshend (§ 209) says, that by an absolutely privileged communication is not to be understood a publication for which the publisher is in no wise responsible, since there are, as will appear upon examination of the authorities, certain restrictions upon the right to speak or print as to all classes referred to except possibly legislative privilege.

Bigelow (p. 167) says, the law upon the subject of absolute privilege may be thus in substance generalized: That no action for slander or libel can be maintained against a person acting in a judicial capacity, nor against suitors, prosecutors, witnesses, counsel, or jurors for anything said or done relevant to the matter in hand, in the course of a judicial proceeding before such tribunal, however false and malicious it may be. Citing Starkie on Libel and Slander, 184; *Munster v. Lamb*, 11 Q. B. 588, and cases cited.

In *Perkins v. Mitchell*, 31 Barb. 461 (468), cases of absolute privilege are referred to as "Words spoken or written in the due course of parliamentary or judicial proceedings."

In some cases the privilege which the law gives to persons in such circumstances, to speak freely, is absolute, however malicious the intent or false the charge may be. This immunity applied

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to words defamatory of the character of another spoken by a member of a legislative body in debate or in due course of proceedings, by counsel in arguments pertinent to the issue before the courts of justice, by military officers in reports or statements to their superiors and all acts of State. From considerations of public policy and to secure the unembarrassed and efficient administration of justice and public affairs, the law denies to the defamed party any remedy through an action for libel or slander in such cases. *Hastings v. Lusk*, 22 Wend. 410; *Moore v. M. N. Bank*, 123 N. Y. 420; *Hemmens v. Nelson*, 138 N. Y. 523.

(A.) *Members of legislature, public officers.*—No member of either house of Parliament is in any way responsible in a court of justice for anything said in the House. Bill of Rights, 1 Wm. & Mary, S. T. 2, c. 2.

Or if a member publishes a speech delivered in the House he is not liable as any private individual would be. *Rex v. Lord Abington*, 1 Esp. 226.

By the Constitution of the United States senators and representatives shall not be questioned in any other place for any speech or debate in either House.

Article 3, section 12, Constitution of the State of New York, provides: "For any speech or debate in either house of the legislature the members shall not be questioned in any other place." Cooley (p. 214), commenting upon these provisions in the American Constitution, says that this exemption exists independent of such a declaration as a necessary principle in free government, and has been recognized ever since the case of the six members, whom an attempt was made to arrest and punish for their action in Parliament in the time of Charles the First.

The leading case in this country as to privilege of legislators is *Coffin v. Coffin*, 4 Mass. 1, 3 Am. Dec. 189, where it was held that a representative is not answerable in an action for a defamation, where the words charged were uttered in the execution of his official duty, although they were spoken maliciously; or where they were not uttered in the execution of his official duty if they are not spoken maliciously with the intent to defame the character of any person. But held that a representative is holden to answer for defamatory words spoken maliciously, not in discharging the functions of his office; and that a representative has no right



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to utter a malicious slander to another member even in the representatives' chamber, not in the execution of his official duties, that to extend the privilege thus far is inconsistent with sound policy.

The following authorities are also cited to this point: *State v. Burnham*, 9 N. H. 34; *Perkins v. Mitchell*, 31 Barb. 461; *McGauv. v. Hamilton*, 184 Pa. St. 108; *Dunham v. Powers*, 42 Vt. 1.

The head of a department "cannot be held liable to a civil suit for damages on account of official communications made by him pursuant to an act of Congress, and in respect to matters within his authority, by reason of any personal motive that might be alleged to have prompted his action; for, personal motives cannot be imputed to duly authorized official conduct. In exercising the functions of his office, the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages." *Spaulding v. Vilas*, 161 U. S. 498.

(B.) Communications in the course of judicial proceedings are privileged.

The English rule, as laid down by Odgers (p. 141), is that no action will lie for defamatory statements in the course of a judicial proceeding if the court have jurisdiction. That everything said by a judge, a witness, or counsel is absolutely privileged, so long as it is connected with the inquiry, and substantially the same rule prevails in this country. The condition of the privilege being that the statements must be made in the course of an action and must be pertinent and material to the case. It is said in *Hoar v. Wood*, 3 Metc. 193, that it is well settled that "words spoken in the course of judicial proceedings though they are such as to impute crime to another and, if spoken elsewhere, would import malice and be actionable in themselves, are not actionable if they are pertinent to the subject of the inquiry." But it is further held that the privilege must be restrained and "that the party or counsel shall not avail himself of his situation to gratify private malice by uttering slanderous expressions, either against a party, witness, or third person which have no relation to the cause or subject-matter of the inquiry."

Words unnecessarily used in a judicial proceeding cannot subject a party to an action, but if things that are injurious and

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foreign to the cause be stated, party is liable. "For the cover of a judicial procedure cannot protect him, since the design of injuring is evident." Borthwick on Libel, 215, note; Townshend on Slander, 332.

Judge Lord, in delivering the opinion of the court in *McLaughlin v. Cowley*, 127 Mass. 316, said: "It was stated in the opinion of this court in the recent case of *Rice v. Collidge*, 121 Mass. 393, that it seems to be settled by the English authorities that judges, counsel, parties, and witnesses are absolutely exempted from liability to an action for defamatory words published in the course of judicial proceedings; and that the same doctrine is generally held in the American courts, with the qualification, as to parties, counsel, and witnesses, that their statements made in the course of an action must be pertinent and material to the case. The doctrine thus qualified was set forth by Shaw, Ch. J., in an elaborate opinion, in *Hear v. Wood*, 3 Metc. 193. The qualification of the English rule is adopted in order that the protection given to individuals in the interest of an efficient administration of justice may not be abused as a cloak from beneath which to gratify private malice." It will be observed that the absolute privilege of a judge appears never to have been limited. In *Aylesworth v. St. John*, 25 Hun, 156, a communication in a justice's return charging the defendant with having slipped a bogus answer among the justice's papers was held to be privileged if it was material or pertinent or was in good faith believed to be so, irrespective of motive.

In the case of judicial proceedings, words spoken or written by a party, by counsel, by a judge, a juror, or a witness, although false, defamatory and malicious, are not actionable if they were uttered in the due course of the proceeding in the discharge of a duty, or the prosecution or defense of a right, and were pertinent and material to the matter in hand. It is unquestionable that a person who institutes a groundless proceeding, whether civil or criminal, against another, upon false or defamatory charges, is liable to an action for the injury he occasions. But that the action must be for the malicious complaint, indictment, or action, and not for the words. Cowen, J., in *O'Donaghue v. McGovern*, 23 Wend. 26; Starkie on Slander, 193.

Words spoken or written in a legal proceeding pertinent and material to the controversy are privileged, and the truth of the statement cannot be drawn in question in an action for slander

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or libel, and where the statement is privileged it is unnecessary for the defendant to deny the allegation of malice. *Garr v. Sheldon*, 4 N. Y. 91.

The subject is discussed in *White v. Carroll*, 42 N. Y. 16, and relates to conditional privilege on the part of a witness, and the rule is there laid down that in that case it was a question for the jury to determine whether the witness testified in good faith, or in the belief that his answers were pertinent and relevant; if so, it was privileged. But, on the other hand, if they believe that the defendant, though testifying as a witness and entitled to the protection of the law, was actuated by malice and used the words for the mere purpose of defaming the witness, then the communication was not privileged. This case is commented upon in *Marsh v. Ellsworth*, 50 N. Y. 309, at 313, and attention is called to the fact that the question put to the defendant, as a witness in *White v. Carroll*, was not material and pertinent to the inquiry. It is said that, had the evidence in that case proved that the answer was material and pertinent, the court must have held it privileged, irrespective of the defendant's belief upon the subject.

"In questions falling within the absolute privilege, the question of malice has no place. However malicious the intent, or however false the charge may have been, the law, from considerations of public policy, and to secure the unembarrassed and efficient administration of justice, denies to the defamed party any remedy through an action for libel or slander. This privilege, however, is not a license which protects every slanderous publication or statement made in the course of judicial proceedings. It extends only to such matters as are relevant or material to the litigation, or at least it does not protect slanderous publications plainly irrelevant and impertinent, voluntarily made, and which the party making them could not reasonably have supposed to be relevant. (*Ring v. Wheeler*, 7 Cow. 725; *Hastings v. Lusk*, 22 Wend. 410; *Gilbert v. People*, 1 Den. 41; Grover, J., *Marsh v. Ellsworth*, 50 N. Y. 309; *Rice v. Coolidge*, 121 Mass. 393; *McLaughlin v. Cowley*, 127 Mass. 316.)" *Moore v. The Manufacturers' Nat. Bank of Troy et al.*, 123 N. Y. 420 (426).

In *Youmans v. Smith*, 153 N. Y. 214 (219), Vann, J., says: "The law governing the privilege of parties and their counsel, so far as applicable to the case in hand, was well stated by Judge Grover in *Marsh v. Ellsworth*, 50 N. Y. 309, 311, as follows:

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'A counsel, or party conducting judicial proceedings, is privileged in respect to words or writings used in the course of such proceedings reflecting injuriously upon others, when such words and writings are material and pertinent to the questions involved: \* \* \* within such limit, the protection is complete, irrespective of the motive with which they are used; but such privilege does not extend to matter having no materiality or pertinency to such questions.' (*Gilbert v. People*, 1 Den. 41; *Hastings v. Lusk*, 22 Wend. 410; *Ring v. Wheeler*, 7 Cow. 725.) In applying this principle the courts are liberal, even to the extent of declaring that, where matter is put forth by counsel in the course of a judicial proceeding that may possibly be pertinent, they will not so regard it as to deprive its author of his privilege, because the due administration of justice requires that the rights of clients should not be imperiled by subjecting their legal advisers to the constant fear of suits for libel or slander. (*Hastings v. Lusk*, *supra*; *Warner v. Paine*, 2 Sandf. 195, 201; *Brook v. Montague*, Cro. Jac. 90; *Hodgson v. Scarlett*, 1 B. & Ald. 232; *Missouri Pac. R. R. Co. v. Richmond*, 4 L. R. A. 280, note; Cooke's Law of Defamation, 63.) Any other rule would be an impediment to justice, because it would hamper the search for truth and prevent making inquiries with that freedom and boldness which the welfare of society requires. If counsel, through an excess of zeal to serve their clients, or in order to gratify their own vindictive feelings, go beyond the bounds of reason, and by main force bring into a lawsuit matters so obviously impertinent as not to admit of discussion, and so needlessly defamatory as to warrant the inference of express malice, they lose their privilege and must take the consequences. In other words, if the privilege is abused, protection is withdrawn."

Words uttered by counsel on the trial are not privileged if not pertinent to the proceeding, but if pertinent they are privileged, no matter how false and malicious they may be. *Ring v. Wheeler*, 7 Cow. 725; *Hastings v. Lusk*, 22 Wend. 410.

A party trying his own action has the same privilege as an attorney. *Allen v. Crofoot*, 5 Wend. 506.

If the fact alleged in a judicial proceeding is material and pertinent, the party setting it up does not lose his privilege by having employed harsh language. *Warner v. Paine*, 2 Sandf. 195.

If words used in the course of judicial proceedings, reflecting

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upon others, are not pertinent and material, party using them is liable. Where a party or an attorney goes out of the way to asperse and villify another by words or writing not material or pertinent to the controversy, he is without protection. *Gilbert v. People*, 1 Den. 41.

Until it is shown that the defendant has acted with express malice, and was using judicial forms in bad faith for the purpose of assailing plaintiff's character, presumption must be extended that the pleading was a privileged communication. *Dadda v. Piper*, 41 Hun, 254.

In *Link v. Moore*, 84 Hun, 118, 32 N. Y. Supp. 461, it is held that the allegations contained in pleadings relevant and material, although false, are absolutely privileged. Affirmed 156 N. Y. 661.

Libelous charges contained in an attorney's brief on appeal are, if pertinent to the issue, absolutely privileged, and the question whether such allegations were pertinent to the issue is for the court to determine. *Sickles v. Kling*, 60 App. Div. 515, 69 N. Y. Supp. 944.

As to like rule in bill of particulars signed by a party and an attorney, see *Perzel v. Towsey*, 52 N. Y. Super. 79; *Prescott v. Towsey*, 53 N. Y. Super. 56.

Statements contained in a notice of pendency of action, pertinent to the description of the claim asserted, are privileged. *Smith v. Smith*, 26 Hun, 573.

Matters stated in an affidavit pertinent to the litigation are privileged. *Garr v. Seldon*, 4 N. Y. 91.

An action cannot be maintained for an assertion of insanity contained in an affidavit made in a proceeding properly and legally instituted. The privilege extends to affidavits, although voluntarily made, if regular and pertinent. *Perkins v. Mitchell*, 31 Barb. 461.

In an affidavit used in opposing application to mitigate bail, it was held that it was a good defense that defendant used the affidavit for that purpose, and that he had a reasonable and probable cause for believing, and did at the time believe, that it was true. *Suydam v. Moffatt*, 1 Sandf. 459.

Where no ground appears upon the face of the publication upon which to base a claim that the libelous charge was relevant or material, it may not be assumed, and the burden of showing their relevancy rests upon the party making them.

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It seems, however, no strained or close construction will be indulged in to exempt a case from the protection of privilege. *Moore v. Manufacturers' Nat. Bank*, 123 N. Y. 420, 421. On subsequent appeal (136 N. Y. 666) judgment was affirmed on authority of opinion *supra*.

The fact that the party makes an affidavit without requiring the party requesting it to take proceedings to have his deposition taken does not affect his privilege. *Beggs v. McCrea*, 62 App. Div. 39, 70 N. Y. Supp. 864.

In *Aylesworth v. St. John*, 25 Hun, 157, it is held that a witness is privileged if the alleged words are material and pertinent, irrespective of motive, and further that, if the person who utters the language believes it in good faith to be pertinent and material, then it is privileged, although he was examined as to its pertinency and materiality, and that it is a question for the jury whether he so believed.

A person testifying, either voluntarily or under process, to matters pertinent and material in a proceeding before a magistrate, is entitled to protection for words uttered. *Perkins v. Mitchell*, 31 Barb. 461.

In *McCabe v. Cauldwell*, 18 Abb. Pr. 377, it is held that the proceedings before a grand jury are not proceedings before a judicial body so as to be protected by statute.

Testimony by a witness that the plaintiff had been bribed by contractors, when given before a common council, against plaintiff, the city engineer, was held to be absolutely privileged, whether true or false, and whether uttered maliciously or not. *McLaughlin v. Charles*, 60 Hun, 239, 14 N. Y. Supp. 608.

While questions of good faith or belief in the truth of the statement, or of actual malice, are for the jury, they cannot arise in connection with the privilege of an attorney in his conduct in a legal proceeding, since, if the privilege is established in such case, the action fails; and, in the determination of the question of the attorney's privilege, it is for the court to decide whether the thing was material and pertinent, or whether the counsel were beyond the bounds of reason, and brought into the case matter obviously impertinent. *Sickles v. Kling*, 60 App. Div. 515, 69 N. Y. Supp. 944, 10 N. Y. Annot. Cas. 68. In the latter report a very full note is given upon "privilege of attorney as to libel and slander," laying down the rule that words or writings used by counsel, in the

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course of judicial proceedings, are absolutely privileged when material and pertinent to the questions involved. Citing *Youmans v. Smith*, 153 N. Y. 214, and that the like rule applies to pleadings, affidavits, and other papers in the action, citing *Link v. Moore*, 84 Hun, 118, 32 N. Y. Supp. 461, affirmed on opinion below 156 N. Y. 661, subject, however, to the rule that, where an attorney goes out of his way to villify another by words or writings not material or pertinent to the controversy, he loses his protection. Citing *Gilbert v. People*, 1 Den. 41; *Ring v. Wheeler*, 7 Cow. 725.

Where defendant, at the request of the attorney retained to make application for the removal of plaintiff as testamentary trustee, made affidavit with respect to qualifications of plaintiff for such office, the statements made therein were privileged, and defendant was not liable therefor in an action for libel. The fact that the affidavit was voluntarily made, without requiring the party requesting it to take proceedings to have his deposition taken, does not render it less privileged, or have any effect upon the relevancy. *Beggs v. McCrea*, 62 App. Div. 39, 70 N. Y. Supp. 864.

Privilege extends only to statements which are material and not to imputations voluntarily made which are plainly irrelevant and impertinent. *Moore v. Manufacturers' Nat. Bank*, 123 N. Y. 420.

§ 3. **Qualified privilege.**—(A) *Qualified privilege in general.*—In cases other than those referred to, in which statements are absolutely privileged, qualified privilege exists where a party may recover damages notwithstanding the communication was privileged, if he can show the words were not used in good faith, but that the party availed himself of the occasion willfully and knowingly for the purpose of defaming the plaintiff. Newell (p. 475) divides conditional privilege into three classes: (1) Where there is duty incumbent upon defendant to make a communication to another person in the *bona fide* performance of his duty. (2) Where both the defendant and the person to whom he makes the communication have a corresponding interest in the subject-matter. (3) Reports of proceedings of courts of justice and legislative bodies.

Fraser (p. 99) defines occasions of qualified privilege as those in which no action lies where the statement is made *bona fide* and in a manner not exceeding what is reasonably necessary for

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the occasion. But proof of actual malice will rebut the *prima facie* protection afforded by such an action and it is for the plaintiff to prove that the defendant acted in bad faith, not for the defendant to prove that he acted in good faith.

Cooley (p. 215) says that the cases only conditionally privileged are those in which the utterance or publication is on a lawful occasion which fully protects it, unless the occasion has been abused to gratify malice or ill-will, and that no action will lie for false statements contained in such a communication unless it be shown that it was both false and malicious, instancing a petition to the executive, and citing *Thorn v. Blanchard*, 5 Johns. 508; *Vanderzee v. McGregor*, 12 Wend. 545; *Streety v. Wood*, 15 Barb. 105; and further, that all official communications made by an officer in the discharge of a public duty are so protected. Citing *Harwood v. Keech*, 4 Hun, 389; *Decker v. Gaylord*, 35 Hun, 584; *Perkins v. Mitchell*, 31 Barb. 461.

Bishop (§ 304) says that the circumstances which make an occasion of this character privileged are diverse and innumerable, and cites from *Joannes v. Bennett*, 5 Allen, 169, a paragraph taken from *Harrison v. Busch*, 5 El. & Bl. 344; a rule which he cites is recognized in *Gasset v. Gilbert*, 6 Gray, 94, as follows: "A communication made *bona fide* upon any subject-matter, in which the party communicating has an interest, or in reference to which he has a duty to perform, is privileged if made to a person having a corresponding interest or duty, although it contains defamatory matter, which without such privilege would be libelous and actionable. In the principal case, Bigelow, Ch. J., said of this definition: "It would be difficult to state the result of judicial decisions on this subject and of the principles on which they rest in a more concise, accurate, and intelligent form." Bartlett, J., in *Byam v. Collins*, 39 Hun, 204, says that the privilege is afforded by the ties of consanguinity or kindred, may arise out of other or various relations of interest, or which suggest duty to furnish information in respect to the conduct and character of another.

Where both the communication and the occasion for it are privileged, the defendant is protected if he had probable cause and acted without malice. The defendant may show when and by whom he had learned the facts stated, and may testify whether or not he believed the statements made to him, provided they were made before the uttering of the alleged slander. *Lally v.*



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*Emery*, 79 Hun, 560, 29 N. Y. Supp. 888, affirmed 151 N. Y. 653.

Where the communication is *prima facie* privileged, malice in making the publication must be shown to authorize a recovery. There are two questions involved in the issue, whether a communication is *prima facie* privileged, namely, was the occasion on which it was made privileged, and did the communication go beyond what the occasion justified, or did it exceed the privilege. *Hill v. Durham House Drainage Co.*, 79 Hun, 335, 29 N. Y. Supp. 427.

Where in an action for slander the defamatory statement or charge is shown to have been privileged, and the burden of showing actual malice is cast upon the plaintiff, simply showing that the charge was false is not sufficient to authorize the submission of the question to the jury. *Hemmens v. Nelson*, 138 N. Y. 517.

(b) *When there is duty to make communication.*—When a communication is made in the discharge of some public or private duty, the occasion prevents the inference of malice which the law draws from unauthorized communication and affords a qualified defense depending upon the absence of malice. *Fowles v. Bowen*, 30 N. Y. 20; *Sunderlin v. Bradstreet*, 46 N. Y. 188 (193).

A communication made without malice upon any subject in reference to which the party communicating has a duty is privileged, if made to a party having a corresponding duty. *Halstead v. Nelson*, 24 Hun, 395, 138 N. Y. 517.

A letter written voluntarily by a married woman to a female friend with whom she had been intimately acquainted, containing derogatory statements concerning plaintiff, with whom the latter was contemplating marriage, the sender being in no way related to the person written to, and under no duty to make the communication, held not privileged. *Byam v. Collins*, 111 N. Y. 143.

Where an employee of a mercantile house has informed its manager that another employee has stolen property of the firm, the subsequent statements of the manager, spoken in the presence of others and to the accused, charging him with the theft, are *prima facie* slanderous, but are, in view of the confidential relation of the parties and the duty of the manager to his employer, regarded as privileged, and the burden is upon the plaintiff of showing express malice to maintain the action. *McCarty v. Lambley*, 20 App. Div. 264, 46 N. Y. Supp. 792.

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A communication by a corporation, such as is required by its by-laws is privileged and affords the members complaining no ground for the action. *Reynolds v. Plumbers' Material Protective Assn.*, 30 Misc. Rep. 709, 63 N. Y. Supp. 303, citing *Lewis v. Chapman*, 16 N. Y. 369; *Sunderlin v. Bradstreet*, 46 N. Y. 188; *Byam v. Collins*, 111 N. Y. 151; *Hemmens v. Nelson*, 138 N. Y. 57.

Communications made by a member of an institution in good faith and without malice, and laying the matter within the line of his duty before executive committee, is privileged. *Hemmens v. Nelson*, 138 N. Y. 517, followed *Pendleton v. Hawkins*, 11 App. Div. 602, 42 N. Y. Supp. 626.

Where defendants made a report to parties by whom they were employed charging plaintiff with gross violation of his official duty, it was held that the report having been made in good faith and upon probable cause was a privileged communication. *Van Wyck v. Aspinwall*, 17 N. Y. 190.

Statement made by a superintendent of city works to a superior officer, concerning a master plumber having dealings with it, "He is crooked; he is as crooked as they make them, and he lied to one of the clerks in the water department and obtained a permit fraudulently from my department,"—*Held* privileged in such case, and burden of showing actual malice is upon the plaintiff, and this is not accomplished by simply proving the charge is false. *Stevenson v. Ward*, 48 App. Div. 291, 62 N. Y. Supp. 717, citing *McCarty v. Lambley*, 20 App. Div. 264, 46 N. Y. Supp. 792.

The report of a committee to examine the financial report of a trustee of the school district which points out irregularities in the finances and is read at a school meeting and then published is privileged, unless it is prepared in bad faith and with malice. A newspaper article written by a member of a committee, in answer to criticisms upon its report, reiterating the statement therein made and calling for explanations is also privileged. *Lent v. Underhill*, 54 App. Div. 609, 66 N. Y. Supp. 1086.

Words spoken by a third person to a landlord in answer to inquiries respecting the character of his tenants are privileged. *Liddle v. Hodges*, 2 Bosw. 537.

Communications made to a mercantile agency as to the credit and responsibility of persons in business and by it made in good faith to a subscriber are to be deemed confidential and privileged.

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*Ormsbee v. Douglas*, 37 N. Y. 477. But the proprietors of such an agency are liable for a false report disseminated by it injurious to the credit of the subject of it, although made in good faith and upon information deemed reliable. A communication is privileged only when it is confined to those having an interest in the information. The fact that the communication was in cipher understood by the subscribers only does not affect the liability. Following *Taylor v. Church*, 8 N. Y. 452; *Sunderlin v. Bradstreet*, 46 N. Y. 188.

A commercial agency is a lawful business and when conducted lawfully is a benefit to society and trade, but no just reason can be given for a rule that would exempt it from liability for a false and defamatory publication, when other citizens would not be exempt. It is not entitled to any privileges beyond the ordinary citizen. *Rapallo, J., in Eaton v. Avery*, 83 N. Y. 34.

A communication by a member of a church with reference to the character and conduct of the clergyman, and seeking his removal, when addressed to the common superior is privileged. *O'Donaghue v. McGovern*, 23 Wend. 26.

Charges preferred to a lodge by one member against another which the lodge has a right to investigate and remedy are privileged. *Streetzer v. Wood*, 15 Barb. 105.

A communication by an agent to his principal relating to his employment and within the scope of it is privileged. *Washburn v. Cooke*, 3 Den. 110.

Words charging theft spoken in good faith to a police officer employed to detect a robber are privileged. *Smith v. Kerr*, 1 Barb. 155.

A complaint to a fire marshal, causing him to institute inquiries into the origin of fire, is privileged if pertinent and material to the inquiry. *Newfield v. Copperman*, 47 How. Pr. 87, 15 Abb. Pr. (N. S.) 360.

School trustees who have reason to question the conduct of a teacher have the right to take evidence as to her misconduct, and their action in so doing is privileged. *Galligan v. Kelly*, 31 N. Y. Supp. 561.

A communication from a resident of a school district to the trustees making charges against a teacher, and asking her removal, privileged. *Smith v. Bennett*, 9 Week. Dig. 549.

Statements made by a patron of a school to the trustees charging

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bad character against a person proposed to be employed as a teacher, *held* privileged as to the trustees; but otherwise as to statements of the same nature made in the presence and hearing of others; but the fact that the person making them had no reason to believe them to be true was held to show malice. The burden of proving malice in case of privileged communications, however, rests upon the plaintiff. *Harwood v. Keech*, 4 Hun, 389, s. c., 6 T. & C. 665.

Communications in good faith to a school commissioner by a resident of the district making charges against a teacher are privileged. The presumption is that they are made in good faith and the burden of proving malice rests upon the plaintiff. The falsity of the charge is not of itself sufficient to raise an inference of malice, nor is the allegation of truth of the charge in the answer by way of justification evidence of malicious intent. *Decker v. Gaylord*, 35 Hun, 584.

A statement to a member of board of excise as to the character of an applicant for a license by a person residing near the place is privileged, and the burden is on the plaintiff to prove malice on the part of defendant. *Coloney v. Farrow*, 5 App. Div. 607, 39 N. Y. Supp. 460.

An action will not lie for charges against a public officer contained in a petition to the authorities empowered to entertain such charges, and claim his removal from office without proof of express malice. *Thorn v. Blanchard*, 5 Johns. 508.

A memorial to the commissioners of excise praying them to withhold a license from plaintiff is privileged, and an action cannot be maintained without showing express malice. *Vanderzee v. McGregor*, 12 Wend. 545.

So also is a memorial to the postmaster-general protesting against his executing a contract on the ground of plaintiff's fraud. *Cook v. Hill*, 3 Sandf. 341.

Where defendant informed a constable that plaintiff had committed a crime and that he should prosecute, and wished the constable to serve the process, no process having been delivered to the constable,—*Held* not privileged. *Burlingame v. Burlingame*, 8 Cow. 141.

In *Howard v. Thompson*, 21 Wend. 319, it was held that an action for sending a letter to a superior officer, having the power of removal, charging a subordinate with fraud in office, that the

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action is for malicious prosecution and plaintiff must prove want of probable cause as well as malice.

(C) *When there is community of interest.*—In *Ormsbee v. Douglas*, 37 N. Y. 477, the court, per Woodruff, J., considers what are to be regarded as privileged communications, enumerating confidential communications made to one interested in the communication, not done maliciously. Citing *Starkie*, 321; *Bradley v. Heath*, 12 Pick. 162; *Weatherston v. Hawkins*, 1 T. R. 110; *Fowles v. Bowen*, 30 N. Y. 20. The latter to the point that in such case proof that the communication was false is not enough to create a presumption of malice.

It was held on appeal from conviction of criminal libel that testimony was not admissible on the question of good faith in the publication of a privileged communication where the communication was not confined to those having an interest in the information, but was published in a newspaper which was for sale and circulated among the people generally. *People v. Sherlock*, 166 N. Y. 180.

A privileged communication ceases to be such when uttered in the presence of others besides the interested person. *Webber v. Vincent*, 29 St. Rep. 603, 9 N. Y. Supp. 101.

It was held in *Hosmer v. Loveland*, 19 Barb. 111, that the privilege as to petition, etc., addressed to public authorities applies only where the body addressed has power to act upon the communication. So held as to a petition to the governor. Like rule laid down in *Fawcett v. Charles*, 13 Wend. 473.

A communication to the public at large in a newspaper in respect to the qualifications of the candidate for an office, the appointment to which is made by a board of limited number, does not stand on the same footing of privilege as if addressed to the appointing power. *Hunt v. Bennett*, 19 N. Y. 173.

Where one has an interest in the matter published, or a duty, even though not of a legal nature, but one only of a moral or social character and of imperfect obligation, and there is a propriety on the publication, and the party makes a statement in good faith to another who has some similar duty or interest, or to whom a like propriety attaches to hear or read the utterance, such a publication is privileged, and the questions of actual malice, good faith, etc., must then be submitted to the jury. *Mattice v. Wilcox*, 147 N. Y. 624 (636).

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But the claim of a moral duty will not be sustained when a person as a volunteer has made defamatory statements against another in a matter in which he had no legal duty or personal interest, unless he can find a justification in some pressing emergency. *Byam v. Collins*, 111 N. Y. 143.

Where an author or publisher, who has obtained a copyright, thereafter publishes a statement that the same book published by another is unauthorized and infringes his copyright, the communication is privileged and its character as such cannot be taken away by proof that the book was not the subject of copyright; it must also be proved that he had knowledge of the invalidity of his copyright, and so that he acted in bad faith. *Lovell Co. v. Houghton*, 116 N. Y. 520.

Communications respecting the character of a servant, made to one who contemplates giving him employment and desires information on the subject, are privileged, citing English authorities; and citing the rule that a publication warranted by an occasion apparently beneficial is not actionable without express malice. That it is not enough that the person to whom the communication is made is interested; as also a communication made to one who had become surety for the purchases of the plaintiff. These principles are stated to have been recognized in this State. *Taylor v. Church*, 8 N. Y. 452; *Fowles v. Bowen*, 30 N. Y. 20.

In *People v. Sherlock*, 166 N. Y. 180, rules on indictment for libel are considered and passed upon. The rule being held as to privileged communications that evidence is not admissible on the question of good faith in the publication of a privileged communication except when it is confined to those having interest in the information, citing *Sunderlin v. Bradstreet*, 46 N. Y. 189.

Plumbers' Material Protective Association was formed, among other things, to diffuse accurate and reliable information among its members as to the standing of merchants; and one of the by-laws, made it the duty of the members to inform the association "Whenever any delinquency or act comes to their knowledge which jeopardizes the credit of any party in the trade;" defendant wrote a letter to the association setting out the failure of plaintiff to pay a bill. It was held that the letter was a privileged communication; that the plaintiff to recover must prove express malice, and that upon proof of express malice that the letter was

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written in bad faith with reference to a disputed item in a bill, plaintiff could recover. *Trapp v. DuBois*, 76 App. Div. 314, 78 N. Y. Supp. 505, citing *Reynolds v. Plumbers' Protective Assn.*, 30 Misc. Rep. 709, 63 N. Y. Supp. 303.

In the latter case plaintiff's exceptions were overruled and motion for new trial denied (53 App. Div. 650); and on appeal to the Court of Appeals (169 N. Y. 614), appeal was dismissed.

Notice by board of trade to its members concerning a member who refused to settle with a comember or consent to arbitration, prohibiting them from selling to him except for cash until he settles, is a privileged communication. *Reynolds v. Plumbers' Material Protective Assn.*, 30 Misc. Rep. 709, 63 N. Y. Supp. 303.

The opinion at Special Term cites and discusses the leading authorities upon the subject in this and other States and in England.

To constitute a privileged communication it is not sufficient that the publisher has an interest in the matter, or a duty in respect to it, but he must make the statement in good faith believing it to be true. *Neil v. Ford, Howard & Hulbert*, 72 Hun, 12, 25 N. Y. Supp. 406.

Words are privileged when used by one in the conduct of his own affairs where his interest was concerned and in reference thereto, and to sustain an action therefor evidence of malice must be given beyond the mere falsity of the charge. *Clapp v. Devlin*, 35 N. Y. Super. 170.

Defendants having been defrauded of a large amount of goods, by reason of false representations, and having probable cause to believe that plaintiff was a party to the fraud, signed a paper, in which they stated they had been "robbed and swindled" by plaintiff and others, and agreed to bear equally the expenses of prosecuting the offenders criminally. *Held*, that the preparation and signing of the paper was a lawful transaction, and it was a privileged communication; that the terms used, though strong and plain, were not irrelevant, and, in the absence of actual malice, did not take away the privileged character of the communication.

The exhibition of the paper to an agent of one of the parties defrauded for the purpose of procuring the signature of the principal was privileged. *Klinck v. Colby*, 46 N. Y. 428.

Plaintiff charged the paternity of her bastard child upon defendant's son. *Held*, that the fact that defendant was engaged

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in an attempt to settle the matter between plaintiff and his son did not authorize him to blacken her character; and a charge made by him, while so engaged, that she was a public prostitute, was not a privileged communication. *Bassell v. Elmore*, 48 N. Y. 561.

Where a church trustee made inquiries concerning a pastor whom the church had called, and he received in reply a letter containing defamatory matter which he showed to other trustees and to another member of the church in good faith, believing it to be true, it was held the publication was privileged. *Pendleton v. Hawkins*, 11 App. Div. 602, 42 N. Y. Supp. 626.

An action will not lie for the speaking of words actionable in themselves if spoken between members of the same church in the course of their religious discipline and without malice. *Jarvis v. Hatheway*, 3 Johns. 180.

Words spoken by a soldier to a member of the same company about another member of the company are not absolutely privileged. Question of good faith, belief in the truth of the statement, and malice are for the jury. *Lally v. Emery*, 59 Hun, 237, 12 N. Y. Supp. 785.

(D) *Report of legislative and judicial proceedings.*—The law is that if the publication complained of is a fair and true report of a legislative proceeding, and it was published without actual malice, it is privileged. *Garby v. Bennett*, 166 N. Y. 392; motion for reargument denied, 167 N. Y. 507. To bring a publication within the provision of section 1907, Code, as being a fair and true report of a judicial proceeding, it must be fair and not so garbled as to produce misrepresentation, and must not by suppression leave a false or unjust impression, although it need not be a verbatim report or embrace the entire proceeding. *Salisbury v. Union and Advertiser Co.*, 45 Hun, 120.

The privilege accorded to correspondents in writing and commenting upon public affairs is no defense if it affirmatively appears to have been used as a means of gratifying malice. *Hart v. Townsend*, 67 How. 88.

Where the article complained of appears to be the report of judicial proceedings and comments thereon, and the report is clear and the comments true, and absence of proof of malice, the complaint must be dismissed. *Johns v. Press Publishing Co.*, 46 St. Rep. 859, 19 N. Y. Supp. 3.



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Privilege appertaining to the report of judicial proceedings does not include imputations plainly irrelevant and impertinent; the question of privilege is then only to be determined by the court and in such case a publication was held not to be a fair report of a judicial proceeding. *Hart v. Sun Printing & Publishing Assn.*, 79 Hun, 358, 29 N. Y. Supp. 434.

It was held in *McCabe v. Cauldwell*, 18 Abb. Pr. 377; *Ackerman v. Jones*, 5 J. & S. 42, that no action would lie for the publication of a fair and true report of a judicial proceeding, except on proof of malice. This includes an *ex parte* affidavit presented to a police magistrate to obtain a search warrant.

A substantially accurate report of the trial of an action is privileged, but if it interpolates comments of counsel not in fact made, containing libelous matter, that is evidence of malice which destroys the privilege in respect to the entire report. *D'Auxy v. Star Co.*, 31 Misc. Rep. 388, 64 N. Y. Supp. 283.

The publication of a slander uttered by a murderer at the time of his execution is not privileged either under the statute or at common law. The statute relates only to statement made in judicial, legislative, or administrative bodies in execution of some public duty. *Sanford v. Bennett*, 24 N. Y. 20.

An action for libel will not lie for the publication of a fair and true report of a judicial proceeding, except upon proof of express malice. *Ackerman v. Jones*, 37 N. Y. Super. 42.

The fact that in a previous controversy opprobrious epithets had been applied by one party to another does not render libelous matter subsequently printed, privileged. *Cassidy v. Brooklyn Daily Eagle*, 46 St. Rep. 334, 18 N. Y. Supp. 930.

It was held in *Stanley v. Webb*, 4 Sandf. 21, that the publication of *ex parte* proceedings before a public magistrate are not privileged, and like holdings as to proceedings before a grand jury.

Both at common law and under the statute a fair report of a public official proceeding is a privileged communication and is libelous only upon proof of actual malice. *Edsall v. Brooks*, 17 Abb. 221, 26 How. 426.

The fact that the injured party was not a party to the judicial proceedings reported does not affect the privileged character of the report. *Ackerman v. Jones*, 37 N. Y. Super. 42.

In an action for libel consisting in publication of a report of judicial proceedings, the question is whether the report was true or not. If it were true it must necessarily be fair, and if false,

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it cannot be fair. *Huff v. Bennett*, 6 N. Y. Super. 120, affirmed, 6 N. Y. 337.

In *Hart v. Sun Printing & Publishing Assn.*, 79 Hun, 358, 29 N. Y. Supp. 434, it was held that the privilege which protects publishers of a report of judicial proceedings from libelous charges does not cover an implication voluntarily made, which is clearly irrelevant. *Held*, that section 1908 so qualifies section 1907 as to make it inapplicable to the libel contained in the heading of such a report, or to any matter added by a person concerned in the publication, or to anything appearing in the report and not forming part of the official proceedings. That it is a general rule that the privilege which protects publishers of reports of judicial proceedings from charges of libel do not include implications voluntarily made which are clearly irrelevant and impertinent. Citing *Moore v. Bank*, 123 N. Y. 420.

In *Weber v. Butler*, 81 Hun, 244, 30 N. Y. Supp. 713, a newspaper was held liable for an article written by a reporter who obtained the information in respect to an action for divorce from the motion papers on file in the county clerk's office. The name of the defendant was the same as the plaintiff in the libel action, but if the reporter had examined the motion papers with care he would have discovered that the defendant in the divorce case was not the same person as the plaintiff in the action for libel. *Held*, that the jury was justified in finding it to be a careless and reckless act to publish the article.

In determining whether head lines prefixed to a published statement are libelous they and the matter following them to which they refer must be construed together. Defamatory head lines prefixed to a report of a judicial decision or of judicial proceedings are no part of the report, but are, in effect, comments upon it and are not privileged unless they are a fair index of the matter contained in a truthful report. *Lawyers' Co-Operative Publishing Co. v. West Publishing Co.*, 32 App. Div. 585, 52 N. Y. Supp. 1120.

See further cases under subdivision 4, "Fair Comment and Criticism."

(E) *Miscellaneous cases.*—A publication by the editor of a newspaper, reflecting on the character of a candidate for public office, is not such a privileged communication as casts the burden of proving malice upon the plaintiff. *Root v. King*, 7 Cow. 613; s. c., 4 Wend. 114.

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To accuse one holding a public office of an offense is not privileged, and if the charge be false the utterer is liable, however good his motives; and this, although the libel relate to an act of the officer in the discharge of his official duties.

The official acts of the officer may be freely criticised, and the occasion will excuse everything but actual malice and evil purpose in the critic; but the occasion will not of itself excuse an attack upon the character and motives of the officer; to excuse this the critic must show the truth of what he has uttered. *Hamilton v. Eno*, 81 N. Y. 116, and cases cited.

A signed publication in a trade journal by one engaged in a similar business, that he had commenced suit against another in the same business for infringing patents used therein, which have been sustained by the courts, and that further infringements by the defendants or his customers should be prosecuted, is privileged and not libelous when the facts so stated are true. *Bowsky v. Cimiotti Unhairing Co.*, 72 App. Div. 172, 76 N. Y. Supp. 465.

A publication reflecting upon the conduct of a manager of an opera toward his employees is not privileged. *Frye v. Bennett*, 3 Bosw. 200.

A publication procured by plaintiff for the purpose of making it the foundation of an action is privileged; unless there has been a previous publication. *Miller v. Donovan*, 16 Misc. Rep. 453, 39 N. Y. Supp. 820.

Plaintiff was in the employ of a board of charities and correction to care for infants abandoned in the streets, and the libel complained of accused her of maltreating and neglecting such infants,—*Held*, that the publication was not privileged, and was not necessary to show malice in order to recover damages. *Ullrich v. N. Y. Press Co.*, 23 Misc. Rep. 168, 50 N. Y. Supp. 788.

No action lies if the defendant can prove that the words complained of are a fair and *bona fide* comment on the matter of public interest. The court decides whether the matter commented on is one of public interest; the jury, if the court is of opinion that there is some evidence that the action is unfair, finds whether it is so in fact. *Fraser*, 89, citing *South Hetton Coal Co. v. N. E. News Assn.* (1894), 1 Q. B. 140.

The privilege of section 1907 of the Code, that an action cannot be maintained against publisher of a newspaper for the publication of a fair and true report of a public and official proceeding, without actual malice, was held not to protect a publication inti-

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inating that a trustee of a charitable association retained its funds. But this section does not apply to a libel contained in the heading of a report or any other matter stated by any other person concerned in the publication, or in the report of such head lines, and such may fall within section 1908 of the Code. *Sarasohn v. Workingmen's Pub. Assn.*, 44 App. Div. 302, 60 N. Y. Supp. 640.

Statements reporting judicial proceedings containing nothing outside the case, and constituting fair and impartial report, should not be adjudged libelous, even though the privilege does not protect against imputations which are irrelevant and impertinent. *Hart v. Sun Printing & Pub. Assn.*, 79 Hun, 358, 29 N. Y. Supp. 434. The headlines of such an article are not privileged.

**SUBDIVISION 4.****Fair Comment and Criticism.**

Fraser (p. 87) emphasizes distinction between report of proceedings and comment thereon. He defines a report as an account, privileged or otherwise, of proceedings which have actually taken place, comment on the other hand as the judgment or opinion of the writer on these proceedings.

Odgers (p. 34) says: "True criticism differs from defamation in the following particulars:

" 1. Criticism deals only with such things as invite public attention, or call for public comment. It does not follow a public man into his private life, or pry into his domestic concerns.

" 2. Criticism never attacks the individual, but only his *work*. Such work may be either the policy of a government, the action of a member of Parliament, a public entertainment, a book published, or a picture exhibited. In every case the attack is on a man's *acts*, or on some *thing*, and not upon the man himself. A true critic never indulges in personalities, but confines himself to the merits of the subject-matter.

" 3. True criticism never imputes or insinuates dishonorable motives (unless justice absolutely requires it, and then only on the clearest proofs).

" 4. The critic never takes advantage of the occasion to gratify private malice, or to attain any other object beyond the fair discussion of matters of public interest, and the judicious guidance of the public taste. He will carefully examine the production before him, and then honestly and fearlessly state his true opinion of it."

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Criticism may be divided into criticism of persons and criticism of things. Every action, everything one does is naturally and necessarily the subject of comment and confers a privilege upon every person to speak or write concerning such action or thing, and as to such actions or things, every one may in good faith speak or write what seems fit to be spoken or written. But as respects the person, there is no such privilege of criticism. Defamatory language concerning a person can never be justified merely on the ground that it was published as a criticism. Townshend, 451, 453.

Cockburn, Ch. J., in *Campbell v. Spottiswoode*, 3 B. & S. 776, said: "I think the fair position in which the law may be settled is this: That where the public conduct of a public man is open to an animadversion, and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct, so that the jury shall say that the criticism was not only honest but also well founded, an action is not maintainable. But it is not because a public writer fancies that the conduct of a public man is open to the suspicion of dishonesty, he is, therefore, justified in assailing his character as dishonest."

It was said in *Gott v. Pulsifer*, 122 Mass. 235, that "The editor of a newspaper has the right, if not the duty, of publishing, for the information of the public, fair and reasonable comments, however severe in terms, upon anything which is made by its owner a subject of public exhibition, as upon any other matter of public interest; and such a publication falls within the class of privileged communications, for which no action can be maintained without proof of actual malice.

Newell, at p. 577, states his conclusion to be, that in New York no attack is allowed, even on the public character of any public officer, and that the defendant honestly believed in the truth of the charge is no defense. No distinction is made between a public man and a private citizen, citing *Hamilton v. Eno*, 81 N. Y. 116; *Lewis v. Few*, 5 Johns. 1; *Root v. King*, 7 Cow. 613, 4 Wend. 113.

Fair and true reports of a proceeding before police magistrates are both within the letter and spirit of section 1907, and such publication is privileged. *Bissell v. Press Pub. Co.*, 62 Hun, 551, 17 N. Y. Supp. 393, overruling *Stanly v. Webb*, 4 Sandf. 21.

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A substantially accurate report of a divorce trial is privileged, but in case it interpolates comments of counsel which were not made as to the truthfulness of testimony, which contain matters libelous *per se*, that is evidence of malice which destroys the privilege in respect to the entire report. *D'Auxy v. Star Co.*, 31 Misc. Rep. 388, 64 N. Y. Supp. 283.

In *Gallagher v. Bryant*, 44 App. Div. 527, 60 N. Y. Supp. 844, affirmed 162 N. Y. 662, on opinion below, it was held that an article claimed to be libelous, together with the head-note, was such as to authorize the overruling of a demurrer to the complaint.

In *Sarasohn v. Workingmen's Publishing Assn.*, 44 App. Div. 302, 60 N. Y. Supp. 640, the same rule is held, and it is said that the libelous implication in an article in its entirety may not be so much in what was said as in the insinuations and inferences to be drawn from the report of it; that extraneous facts and covert innuendoes to be drawn from the publication may render it libelous, although proof of such facts may be admissible as bearing upon the good faith of the defendant, intending to disprove actual malice and in mitigation of damages.

In determining whether head lines prefixed to a published statement are libelous, they and the matter following them to which they refer must be construed together. Defamatory head lines prefixed to a report of a judicial decision or of judicial proceedings are no part of the report, but are, in effect, comments upon it and are not privileged unless they are a fair index of the matter contained in a truthful report. *Lawyers' Co-operative Pub. Co. v. West Publishing Co.*, 32 App. Div. 585, 52 N. Y. Supp. 1120.

In an action for libel it is for the court to determine whether the alleged libel was a privileged communication; but the questions of good faith, belief in the truth of the statement, and the existence of actual malice remain for the jury.

The rule is the same where the alleged libelous charge is made against a public officer as such.

To accuse one of holding a public office of an offense is not privileged, and if the charge be false the utterer is liable, however good his motives; and this, although the libel relate to an act of the officer in the discharge of his official duties.

The official acts of the officer may be freely criticised, and the occasion will excuse everything but actual malice and evil purpose

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in the critic; but the occasion will not of itself excuse an attack upon the character and motives of the officer; to excuse this the critic must show the truth of what he has uttered. *Hamilton v. Eno*, 81 N. Y. 116.

One cannot attack in an aspersive manner the private or professional character of the plaintiff, certainly not unless there is some fair and plausible reason for so doing in the course of proper and appropriate criticism. If an individual choose to attack an officer and charge him with incompetency in his professional character and with criminality in an office (if the jury should so construe his language) he must be prepared, when brought into court, to prove the truth of his charge. *Mattice v. Wilcox*, 147 N. Y. 624 (637).

A criticism denouncing plaintiff's work as "one of the worst stories that had been printed since Sterne, Fielding, and Smollet defiled the literature of the already foul eighteenth century," that it "is not only tainted with this one foul spot; it is replete with impurity; it reeks with allusions that the most prurient scandal-monger would hesitate to make," is not legitimate and of such a character as to protect a party against an action. *Reade v. Sweetzer*, 6 Abb. Pr. (N. S.) 9.

Several notable illustrations of the English rule regarding the right of criticism of literary publications, books, pictures, etc., will be found in Newell, 587, including the celebrated case of *Whistler v. Ruskin*.

The best known case in this State upon this point is *Frye v. Bennett*, reported 5 Sandf. 54, 4 Duer, 247, 3 Bosw. 201, 28 N. Y. 324, arising out of a criticism in the New York Herald upon the conduct of plaintiff as manager of an Italian opera.

When a paper published is a privileged communication plaintiff must show malice in its publication. The court may determine whether the subject-matter to which the alleged libel relates, the interest in it of the defendant, or his relations to it are such as to furnish an excuse, but the question of good faith, belief in the truth of the statement, and the existence of actual malice, remains although the court should hold that *prima facie* the communication was privileged, and this question is one for the jury. *Klinck v. Colby*, 46 N. Y. 429.

If a person discolors or garbles the account of the proceedings, and adds comments and insinuations of his own in order to asperse

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the character of the party concerned it is libelous. *Thomas v. Croswell*, 7 Johns. 264.

Comments on report which are justified by the facts disclosed will not in a civil action make the article libelous, except upon proof of malice. *Johns v. Press Publish. Co.*, 46 St. Rep. 859, 19 N. Y. Supp. 3.

**SUBDIVISION 5.****Former Recovery.**

Separate actions cannot be maintained for separate parts of a libelous publication, but recovery in one action exhausts the remedy, though not based on all the charges. *Galligan v. Sun Printing & Pub. Assn.*, 25 Misc. Rep. 355, 54 N. Y. Supp. 471, 28 Civ. Proc. 349.

It is held in the same case that the republication on the same day of the same article, before the commencement of the action, does not afford ground for the second action, although it may be proven on the question of malice and extent of injury.

Since a plaintiff may recover in an action for malicious prosecution, not only for the unlawful arrest and imprisonment, but for the injury to his reputation, occasioned by false accusation, such a recovery is a bar to a subsequent action for slander for the accusation uttered for the purpose of having the arrest made, and on the occasion when it was made. *Sheldon v. Carpenter*, 4 N. Y. 579, cited and followed in *Rockwell v. Brown*, 36 N. Y. 207, where it is held that where the accusation in two cases is identical, the prosecution and judgment in the one will be a bar to the prosecution in the other, but if they relate to different utterances, although they allude to the same accusation, it is otherwise.

Both these authorities are cited with approval in *Woods v. Pangburn*, 75 N. Y. 495 (498, 499).

A previous recovery upon the same general charge is not a bar to an action unless the slander alleged was the same accusation. The utterance of the charge, after the prosecution of the charge had terminated, is an independent cause of action. *Rockwell v. Brown*, 36 N. Y. 207.

A judgment against a news agency for transmitting a libelous article to its customers for publication is not a bar to an action against the publisher of a particular newspaper for the publication of the article therein. *Union Associated Press v. Heath*, 49 App. Div. 247, 63 N. Y. Supp. 96.



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## ARTICLE X.

## PARTIES.

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## SUBDIVISION 1.

## Plaintiffs.

When words are spoken of two or more persons, they cannot join in an action for the words, because the wrong done to one is no wrong to the other, with two exceptions, namely, defamatory words published of partners, in the way of their business, and slander of the title of joint owners of land. *Newell*, 360, citing *Hinkle v. Davenport*, 38 Iowa, 355; *Robinett v. McDonald*, 65 Cal. 611; *Langhead v. Bartholomew*, Wright (Ohio), 90; *Gazynski v. Colburn*, 11 Cush. 10; *Bash v. Sumner*, 20 Pa. St. 159.

It was said in *Sumner v. Buel*, 12 Johns. 474, that no writing is deemed a libel unless it reflects upon some particular person, and that a writing which inveighs against mankind in general, or against a particular order of men, is no libel. It must descend to particulars and individuals to make it a libel. Citing Hawkins' Pleas of the Crown, 3 Salk. 224, 1 Ld. Raym. 486.

This case was followed in *White v. Delevan*, 17 Wend. 49, but in *Rightman v. Delevan*, 25 Wend. 203, is questioned, opinion Senator Verplanck, and *Gedney v. Blake*, 11 Johns. 54, is cited with approval, where the slander was "your children are thieves and I can prove it," where it was held that the charge was sufficiently definite to designate plaintiff as one of the children intended.

These authorities are cited and followed in *Maybee v. Fisk*, 42 Barb. 326 (335).

In *Palmer v. Bennett*, 83 Hun, 220, 31 N. Y. Supp. 567, affirmed without opinion 152 N. Y. 621, it is held that it is not necessary in order to justify a recovery for a libel, that the plaintiff should have been named in the alleged libelous article, it is sufficient that the description or reference contained in such article identifies him. Citing *Sumner v. Buel*, *supra*; Townshend on Libel, § 131.

A publication charging that a certain house is a bawdy-house re-

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fers to the character of the occupants, and is not merely a libel on the house, and one of its occupants may maintain an action for libel. *McLean v. N. Y. Press Co.*, 46 St. Rep. 706, 19 N. Y. Supp. 262.

A corporation may sue for any libel upon it as distinct from a libel upon its individual members. It may be also sued for a slander upon it in the way of its business or trade. *Odgers*, 415.

A corporation may maintain an action for libel the same as individuals, for words affecting the business or property. *Knickerbocker Life Ins. Co. v. Ecclesine*, 11 Abb. Pr. (N. S.) 385, 42 How. Pr. 201, affirming 6 Abb. Pr. (N. S.) 9; *Shoe & Leather Bank v. Thompson*, 18 Abb. 413.

Where statements contained in an article, published by a newspaper, which described and censured the acts of a number of medical graduates, who were employed upon the house staff of a public hospital, in hanging an effigy of the medical superintendent of the hospital, although true in part, were erroneous and defamatory in some respects, one of the medical graduates referred to in such article may maintain an action for libel against the newspaper, since the legal effect of the publication is the same as if he had been the only physician referred to, and, where the answer mentioned him by name, as if reference had been made to him *eo nomine*. *Bornmann v. Star Co.*, 174 N. Y. 212.

A corporation may sue for any libel upon it as distinct from a libel upon its individual members, and a corporation engaged in business may maintain an action for libel without proof of special damage, where the language used concerning it is defamatory in itself and injuriously and directly affects its credit, and necessarily and directly occasions pecuniary injury. *Union Associated Press v. Heath*, 49 App. Div. 247, 63 N. Y. Supp. 96, citing 13 Am. & Eng. Encyc. of Law (1st ed.), 448; *Mutual Assn. v. Spectator Co.*, 50 N. Y. Super. 460.

In the principal case the judgment below was reversed, the court stating that the court below dismissed the complaint relying upon the *Union Associated Press. Co. v. Press Pub. Co.*, 24 Misc. Rep. 610, 54 N. Y. Supp. 183.

Where an alleged libelous publication charged that there was a gang of blackmailers in an association, of which plaintiff was an officer, but contained nothing to charge that plaintiff was a member of the gang,—*Held* not libelous as to plaintiff. *Hauptner v. White*, 81 App. Div. 153, 80 N. Y. Supp. 895.

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## SUBDIVISION 2.

## Defendants.

Where a libel has been published against plaintiff by different persons at different times, he may bring an action not only against each publisher, but to recover whatever damages the jury may think each publication may have caused him. Each libel is a separate and distinct tort, and each person who sees fit to publish it is separately liable to the plaintiff for whatever damages may be fairly said to accrue. The true rule is that whoever publishes a libel publishes it at his peril and he cannot mitigate his damage because some other reckless and evil-disposed person first incurred the same liability he has for the same story. *Union Associated Press v. Heath*, 49 App. Div. 247, 63 N. Y. Supp. 96, citing *Palmer v. N. Y. News Pub. Co.*, 31 App. Div. 212, 52 N. Y. Supp. 539; *Woods v. Pangburn*, 75 N. Y. 498.

A libel may be perpetrated by more than one person. *Rosenberg v. Nesbit*, 14 St. Rep. 248.

The author, publisher, seller, and every other person who knowingly does the wrong is liable, and an action can be maintained against them either jointly or severally. *Zoumans v. Smith*, 153 N. Y. 214; *Thomas v. Rumsey*, 6 Johns. 26; 2 Addison on Torts, 364; Townshend on Libel and Slander, § 119, cited *Union Associated Press Co. v. Heath*, 49 App. Div. 255, 63 N. Y. Supp. 96, dissenting opinion, McLaughlin, J.

There may be a joint publication by writing, but there cannot be a joint oral publication. If two or more utter like words either simultaneously or separately, it is not a joint publication, but a several publication by each for which they cannot be sued jointly. Townshend, 98, citing *Chamberlaine v. Willmore*, 2 Wms. Saund. 117a; *Forsyth v. Edminston*, 2 Abb. Pr. 431.

Where the publication of a libel is the joint act of two or more persons, they may be joined in the same action, and if separate suits are brought against the plaintiff, he can have but one satisfaction. *Thomas v. Rumsey*, 6 Johns. 26.

In *Andres v. Wells*, 7 Johns. 260, it was held that where a newspaper establishment had been assigned to a person as security, and the press remained in the possession and management of the assignor, the ownership of the assignee was not such as to render him liable for the libelous publication.

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Where, in an action against a corporation, defendant was sued with others, it is alleged in the complaint that the corporation combined and confederated with the other defendants to injure the plaintiff by circulating false and slanderous statements to his injury with the view of compelling him to become a subscriber to the publications of the corporation defendants, in pursuance of which combination the slanderous words were uttered by the other defendants,—*Held*, upon demurrer to the complaint, that a cause of action was alleged against the corporation. *Dodge v. Bradstreet Co.*, 59 How. 104.

A corporation is liable for a libel published by its servants or agents whenever such publication comes within the scope of the general duties of such servants or agents, or whenever the corporation has expressly authorized or directed such publication. *Odgers*, 416, citing *Abrath v. North Eastern Ry. Co.*, 11 App. Cas. 253, 254; *Aldrich v. Press Printing Co.*, 9 Minn. 133; *Johnson v. St. Louis Dispatch Co.*, 65 Miss. 539, 27 Am. Rep. 293.

The law does not recognize any difference or responsibility between ownership of a newspaper by a corporation and by individual. Such corporations are capable of legal malice and it should be imputed to them by the law whenever it would be to individual ownership. *Samuels v. Evening Mail Association*, dissenting opinion, Davis, P. J., 9 Hun, 294, adopted by Court of Appeals on reversal, 75 N. Y. 604.

That the corporation is responsible in its corporate capacity for the publication of a libel is held in *Phila., Wilmington & Baltimore Co. v. Quigley*, 21 How. (U. S.) 202.

Where a corporation employed a person to repeat slanders with reference to plaintiff's business among plaintiff's customers, the acts of such person are the acts of the defendant, and he becomes liable for all the damages sustained by plaintiff by reason thereof. *Buffalo Lubricating Oil Co. v. Standard Oil Co.*, 42 Hun, 153.

An action for libel may be brought against a joint-stock company. *Van Aernum v. McCune*, 32 Hun, 316, affirmed as *Van Aernum v. Bleisten*, 102 N. Y. 355, and holding that an action for libel is maintainable against a joint-stock company which publishes the newspaper in which the libel is contained. It seems the officers of the company, or the publishers or editors employed by it have the same power when acting within the scope of their authority to bind the company and all the associates which the ordinary partner has to bind the firm and his copartners.

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In *Eichner v. Bowery Bank*, 24 App. Div. 63, 48 N. Y. Supp. 978, 5 N. Y. Annot. Cas. 106, the rule laid down in *Townshend*, 265, and *Odgers*, 368, is reiterated that a corporation can act only by or through its officers or agents, and that as there can be no agency to slander, that the corporation cannot be guilty of slander unless it can be proved that the corporation expressly ordered and directed the officer to use the words complained of, since a slander is a voluntary tortious act of the speaker.

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**SUBDIVISION 1.****The Complaint.**

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§ 1. **Common-law rules.**— It is very appropriately said (Newell, 595), that it would appear from examination of the earlier cases for libel and slander in the State of New York that the contest was almost without an exception a contest of pleaders, and that “matters in litigation appear to have become insignificant in comparison with the manner of stating them in the pleadings.” This difficulty was to some extent remedied by the Code of Procedure by which the common-law method of plea was abrogated, and an effort made to avoid the subtleties and technicalities which had crept into that form of pleadings to the exclusion of the substance. In no class of cases had these subtleties and technicalities been encouraged to so great an extent as in actions for libel and slander, more particularly the latter. An effort was made by specific provisions of the Code of Procedure to which reference will be hereafter had to simplify the practice in that respect. For

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this reason comparatively little attention need be given to the common-law rules of pleading, and they are only applicable in so far as the terms employed survive, and in so far as we have unfortunately been unable to entirely escape from some of the rules which became firmly fixed under the former practice.

At common law important parts of the complaint were the *averment*, the *colloquium*, and the *innuendo*, without which no complaint was regarded as sufficient. Van Ness, J., in *Van Vechten v. Hopkins*, 5 Johns. 211, at 220, defines the meaning and states the use of each of these terms. The following may be gathered from the authorities and the law dictionaries as to the terms in question.

The *Averment* is a positive statement of facts as opposed to an argumentative or inferential one, and its office is to show to the court clearly what is generally or doubtfully expressed, so that the court may know of whom and to what the matters are alleged, and also to add matter to the plea to make doubtful things clear.

The *Colloquium* in actions for libel and slander is the specific averment that the language in question was published or uttered of or concerning the plaintiff. It is said, Townshend on Libel and Slander, § 323, that the term is frequently used to denote the colloquium proper, as above defined, and also what is termed the inducement; the *Inducement* being defined as a statement of matter which is introductory to the principal subject of the declaration or plea, and which is necessary to explain or elucidate it. The *Innuendo* is explanatory of the subject-matter, sufficiently expressed before; and explanatory of such matter only, since it is held that it cannot explain the sense of the words beyond their own meaning, unless something is put upon the record for it to explain. *Milligan v. Thorn*, 6 Wend. 412.

It seems that an extrinsic fact necessary to be shown in order to give point and clearness to the language as slanderous and libelous is an averment. *Van Vechten v. Hopkins*, 5 Johns. 222, citing *Hawkes v. Hawkey*, 8 East, 427.

The colloquium is the allegation that the language published was concerning the plaintiff, or concerning the plaintiff in his affairs, or concerning the plaintiff and the facts alleged as inducement. Townshend, 55.

Inducement is the statement of the facts out of which the

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charge arises, or which are necessary or useful to make the charge intelligible. It is necessary where the language does not naturally and *per se* convey the meaning which the plaintiff would attribute to it, and where a reference to some extrinsic fact is necessary to explain it. As where the language is claimed to be ironical, it must be so alleged in the inducement. *Townshend*, 504, citing *Taverner v. Little*, 5 Bing. N. C. 678; *Dorsey v. Whipps*, 8 Gill, 457; *Fry v. Bennett*, 5 Sandf. 54; *Boydwell v. Jones*, 4 M. & W. 446.

Nor is inducement necessary where the language in its ordinary acceptation imports a charge of crime. *Case v. Buckley*, 15 Wend. 327; *Smith v. Ottendorfer*, 3 St. Rep. 187, citing *More v. Bennett*, 48 N. Y. 472.

The subject is fully discussed and the definitions in *Van Vechten v. Hopkins*, *supra*, adopted in *Cooper v. Greeley*, 1 Den. 347 (360), where authorities are cited to the point that the office of an innuendo is to apply the libel to the precedent matter; and it cannot be used to add to, extend, enlarge, or change the sense of the previous words, although it may explain the meaning of words. Still further, that when the libelous meaning is apparent on the face of the declarations, innuendoes and averments are unnecessary. The office of an innuendo is to bind the plaintiff, not to enlarge the sense of words; it is not the subject of proof, and only adds such explanatory matter in relation to the words uttered as must have been understood by the hearers at the time. See also as to the object of an innuendo, *Spencer v. Southwick*, 11 Johns. 573, reversing 10 Johns. 259.

The office of an innuendo is to aver the meaning of the language published. It means nothing more than the words "meaning" or "aforesaid," as explanatory of the matter stated before. *Rex v. Hown*, 2 Cow. 688.

Where words are used in a double sense, the plaintiff may by an innuendo aver the meaning with which he desires the jury to understand they were spoken. *Smith v. Cary*, 3 Campb. 461.

The omission of the averment that the slanderous words were spoken of, and concerning plaintiff, was held fatal, even after verdict. *Sayre v. Jewett*, 12 Wend. 135.

Although it seems that when the declaration showed, with reasonable certainty, that the words were spoken of and concerning plaintiff, it might be held sufficient under such circumstances. *Nestell v. Van Slyck*, 2 Hill, 282.

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These questions are discussed in *Chapman v. Smith*, 13 Johns. 78; *Burtch v. Nickerson*, 17 Johns. 217; *Miller v. Maxwell*, 16 Wend. 9; *Gidney v. Blake*, 11 Johns. 54; *Crosswell v. Weed*, 25 Wend. 621; *Gilbert v. Field*, 3 Cai. 329; *Vaughn v. Havens*, 8 Johns. 109; *Andrews v. Woodmansee*, 15 Wend. 232.

§ 2. **Code provisions.**—By the provisions of section 484, the plaintiff may unite in the same complaint two or more causes of action, whether they are such as were formerly denominated legal or equitable, or both, where they are brought to recover, as follows:  
\* \* \*

“3. For libel or slander. \* \* \* But it must appear upon the face of the complaint, that all the causes of action so united, belong to one of the foregoing subdivisions of this section; that they are consistent with each other; and, except as otherwise prescribed by law, that they affect all the parties to the action; and it must appear upon the face of the complaint, that they do not require different places of trial.”

Section 535 of the Code of Procedure provides: “It is not necessary, in an action for libel or slander, to state, in the complaint, any extrinsic fact, for the purpose of showing the application to the plaintiff of the defamatory matter; but the plaintiff may state, generally, that it was published or spoken concerning him; and, if that allegation is controverted, the plaintiff must establish it on the trial.”

It is sufficient, under the Code, to state generally that the defamatory matter was published or spoken of the plaintiff. Where there is no uncertainty that the words were intended to apply to the plaintiff, it is unnecessary to allege in the petition any extrinsic fact to show that the defamatory matter was intended to apply to him, but it is sufficient to allege generally that fact. If the words published or spoken are actionable *per se*, as “John Williams stole my watch; he is a thief,” no words of explanation or inducement are necessary to show to whom the language was intended to apply, and it is sufficient to allege that the words were spoken of the plaintiff; but if the language is vague, leaving it uncertain whether the words were intended to apply to the plaintiff or some other person, or where the words themselves do not show what the defendant intended others to understand, then it is necessary to state extrinsic facts to give the real meaning of the words as they were intended by the defendant to be understood. Maxwell on Code Pleading, 206, 207.



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The Code only dispenses with the *inducement* to show the application of the language to the plaintiff, it does not dispense with the necessity of averments of extrinsic facts to show the meaning of ambiguous language, and where the language published is not defamatory on its face and becomes so only by reference to extrinsic facts, existence of these facts must be alleged in the complaint. *Townshend*, 541, citing *Pike v. Van Wormer*, 6 How. 99; *Dias v. Short*, 16 How. 322; *Frye v. Bennett*, 5 Sandf. 54; *Blaisdell v. Raymond*, 4 Abb. Pr. 446; *Wallace v. Bennett*, 1 Abb. N. C. 478.

Where the words uttered concerning the plaintiff would ordinarily and naturally be understood by an intelligent man and by people generally with charging plaintiff with a crime and actionable *per se* a complaint is sufficient without an innuendo. *Keller v. Dean*, 57 App. Div. 7, 67 N. Y. Supp. 842, citing numerous authorities, among others, *Garby v. Bennett*, 40 App. Div. 163, 57 N. Y. Supp. 857; *Mooney v. Bennett*, 44 App. Div. 423, 60 N. Y. Supp. 1103; *Hemmens v. Nelson*, 138 N. Y. 517; *Turton v. N. Y. Recorder Co.*, 144 N. Y. 144.

In *Walrath v. Nellis*, 17 How Pr. 72, it is said that it is unnecessary to aver that defendant was and meant to be understood by the hearers as charging plaintiff with the crime imputed, except when the language is couched in ambiguous, ironical, or insinuating words.

Extrinsic averments are not necessary, where the words by natural construction tend to injure plaintiff's reputation and subject him to hatred, contempt, or ridicule. *More v. Bennett*, 48 N. Y. 472.

Words which are of themselves actionable, which, in their natural construction, tend to injure the memory of the dead, or the reputation of one alive, and expose him to hatred, contempt, or ridicule, need no averment that they were intended to impute such offense. It is only where the words do not, of themselves, fairly charge the offense, that extrinsic averments are necessary. *Cooper v. Greeley*, 1 Den. 347; *Croswell v. Weed*, 25 Wend. 621.

But allegations of extrinsic facts claimed to show intent to connect plaintiff with commission of certain crimes are erroneously stricken out as irrelevant. *Morgan v. Bennett*, 40 App. Div. 619, 57 N. Y. Supp. 1088.

In *Hemmens v. Nelson*, 138 N. Y. 517, it is held that where

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the words are ambiguous, the intent of the defendant in the sense in which the words were used becomes an important inquiry which is not permissible at the trial without a proper allegation in the pleading.

The Code has not dispensed with the necessity of inducement and innuendoes where necessary to point to the libelous meaning. *Wallace v. Bennett*, 1 Abb. N. C. 478.

Innuendo is only necessary where the published words are harmless unless coupled with the plaintiff to his injury. *Youmans v. Paine*, 86 Hun, 479, 35 N. Y. Supp. 50.

If the words employed in libel do not necessarily refer to the person complaining, plaintiff must allege in issuable form that they were intended to, and were understood by others to be applicable to him, or must follow the form prescribed by the Code and allege that the matter was published "of and concerning the plaintiff." *Crane v. O'Reilly*, 13 Civ. Proc. 71.

Where words are ambiguous, the question whether they are used in a defamatory sense is for the jury, and innuendoes are proper to show the latent and injurious meaning, and should not be stricken from a complaint. *Barnard v. Press Publishing Co.*, 43 St. Rep. 507, 17 N. Y. Supp. 573.

A complaint contained the averment authorized by section 535 that the words complained of were published "concerning the plaintiff." The court is bound to assume that the article referred to plaintiff. *Wesley v. Bennett*, 5 Abb. Pr. 498; *Hussey v. N. Y. Recorder Co.*, 89 Hun, 609. But see *Fleischman v. Bennett*, 87 N. Y. 231.

But the mere allegation in the complaint that the article was published of and concerning the plaintiff does not, under the principle that a demurrer admits the complaint, make out a cause of action, the other facts stated being at variance with such allegation. *Wellman v. Sun Printing & Publishing Assn.*, 66 Hun, 331, 21 N. Y. Supp. 577, citing and following 87 N. Y. 231.

Pursuant to section 519, requiring the allegations of a pleading to be liberally construed, the provisions of section 535, that the defamatory matter was published or spoken concerning him, is satisfied, if the express language of the Code is not used, but an equivalent statement appears in the pleading. *Jacquelin v. Morning Journal Assn.*, 39 App. Div. 515, 57 N. Y. Supp. 299.

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See also *Crandall v. Jacob*, 22 App. Div. 400, 48 N. Y. Supp. 279.

An averment that words were published with malicious intent and purpose to injure the business of the plaintiff is not equivalent to an allegation that they were stated of and concerning him. And the demurrer should not be struck out as frivolous. *N. Y. & Westchester Water Co. v. Morning Journal Assn.*, 7 App. Div. 609, 40 N. Y. Supp. 272.

Should plaintiff's allegation show that the libel could have had no application to him, an allegation that the libel was spoken of and concerning him will not sustain his pleading against a demurrer. *Fleischman v. Bennett*, 87 N. Y. 231.

It is not a ground for motion to dismiss the complaint that the innuendoes are ambiguous or uncertain, the question as to their meaning may be submitted upon proper requests to the jury. *Bergmann v. Jones*, 94 N. Y. 51.

Since the Code it is not necessary to insert words of innuendo in a complaint for libel, except in the case the words complained of are harmless unless applied in some way to plaintiff to his injury, but a general allegation that they were spoken of him is sufficient. *Youmans v. Paine*, 86 Hun, 479, 35 N. Y. Supp. 50.

The office of an innuendo is to explain doubtful words and phrases and annex to them their proper meaning, but it cannot extend the sense of the words beyond their natural import unless something is alleged by way of introductory matter with which they can be connected. The office of an innuendo is to explain, to point the meaning of the words used, and if these words do not constitute slander or libel the innuendo cannot aid them. *Maxwell on Code Pleading*, 208.

The meaning of the words cannot be extended by innuendo beyond their natural import aided by reference to the extrinsic facts with which they may be connected. *Gallup v. Belmont*, 41 St. Rep. 233, 16 N. Y. Supp. 483, citing *Woodruff v. Bradstreet Co.*, 116 N. Y. 217, affirmed, without opinion, 135 N. Y. 647; *Sanderson v. Caldwell*, 45 N. Y. 398.

An innuendo does not enlarge the matter set forth in the alleged libelous words. *Kingsley v. Kingsley*, 79 Hun, 569, 29 N. Y. Supp. 921.

Where there is nothing in an article which shows that any of the allegations were made in respect to the trade or business in

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which a person was engaged, an innuendo will not change or enlarge the plain meaning of the words. It is not enough that the language tends to injure such person in his office, profession, or trade, but it must be proven to have been spoken in relation thereto. *Keene v. Tribune Assn.*, 76 Hun, 488, 27 N. Y. Supp. 1045.

Where the alleged libelous words are ambiguous and the complaint assigns a particular meaning to them by way of an innuendo, an issue may be joined upon the question whether the words convey the meaning assigned them by the innuendo. *Hollingsworth v. Spectator Co.*, 53 App. Div. 291, 65 N. Y. Supp. 812.

The plaintiff is bound by the innuendo. *Morse v. Press Publishing Co.*, 49 App. Div. 375, 63 N. Y. Supp. 423.

Where plaintiff alleges special meaning for the alleged libelous words sued on, that is the only meaning which defendant need meet in pleading or on trial. *Wuest v. Brooklyn Citizen*, 38 Misc. Rep. 1, 76 N. Y. Supp. 706.

Where plaintiff sets out the objectionable language and follows it with an innuendo ascribing a certain meaning thereto, he is limited to the meaning so ascribed, and if not libelous there is no cause of action. *Brown v. Tribune Assn.*, 74 App. Div. 359, 77 N. Y. Supp. 461.

In libel the plaintiff may always avoid a meaning of which the words complained of are susceptible by confining his complaint to a particular meaning of them, but he is bound by the meaning he selects and if he fails on it he cannot fall back on the general meaning of the words. *Martin v. Press Publishing Co.*, 40 Misc. Rep. 524. See *Morrison v. Smith*, 83 App. Div. 206.

In *Parker v. Bennett*, 68 App. Div. 148, 74 N. Y. Supp. 214, it was held that upon the facts disclosed in the article set out in the complaint the meaning ascribed to it in the innuendo could not be sustained.

In *Hauptner v. White*, 81 App. Div. 153, 80 N. Y. Supp. 895, it was held that the innuendo contained in the complaint was not sufficient to sustain a cause of action as the publication itself did not bear out such innuendo. That under the circumstances of the case the allegation that words complained of were published of and concerning the plaintiff was not sufficient under section 535 to justify the plaintiff in proving facts which would show that he was the individual referred to in the publication. Further

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held that the complaint was not cured by the answer, as the fact that defendant in an action of libel alleges matters of justification of the publication is not an admission of any fact essential to the plaintiff's recovery.

§ 3. **What allegations are necessary.**—A complaint for libel must set out the language used. It is not enough to state its purport. *Wood v. Brown*, 6 Taunt. 169; *Cheetham v. Tillotson*, 5 Johns. 430; *Culver v. Van Anden*, 4 Abb. Pr. 375.

The complaint should set forth the words constituting the slander. It is not sufficient to allege their purport or effect or state the tenor of the charge. *McDonald v. Edwards*, 20 Misc. Rep. 523, 46 N. Y. Supp. 672; *Battersby v. Collier*, 24 App. Div. 89, 48 N. Y. Supp. 76, 34 App. Div. 347, 54 N. Y. Supp. 363.

The words made must be proved in substance, and different words, although imputing the same charge, but entirely different language, will not support the complaint. *Enos v. Enos*, 135 N. Y. 609.

In *Miller v. Holmes*, 19 N. Y. Supp. 701, 46 St. Rep. 871, Dugro, J., cites from Abb. Tr. Ev. 61, the proposition "Where the allegation and proof vary as to the words, it is enough if plaintiff proves that a distinct slanderous charge alleged, which is separable from any other unproven words alleged, was uttered in substantially the words alleged, it not appearing to have been materially qualified by other words not alleged."

If a libelous article was published in a foreign language, both the foreign words and the correct translation should be set forth. *Lettman v. Ritz*, 3 Sandf. 734.

A complaint which alleges the composition of a libelous article by one defendant and its publication in a newspaper by the other is sufficient to charge both as publishers of the article. *Baker v. McClellan*, 21 St. Rep. 893, 3 N. Y. Supp. 315.

Complaint in slander is not effective if it does not allege the words to be spoken in the presence and hearing of some person. *Wood v. Gilchrist*, 1 Code Rep. 117.

It is not necessary to aver express malice or want of probable cause. *Purdy v. Carpenter*, 6 How. Pr. 361; *Malone v. Stillwell*, 15 Abb. Pr. 421; *Ulrich v. N. Y. Press Co.*, 23 Misc. Rep. 168, 50 N. Y. Supp. 788.

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Where the matter charged is libelous as matter of law, an allegation that it was false and malicious is unnecessary, and even though it were necessary, an allegation that it was a libel is a sufficient allegation of falsehood and malice. *Hunt v. Bennett*, 19 N. Y. 173.

A complaint setting forth the whole of the objectionable libel, and averring that the whole is false and defamatory, is sufficiently definite and certain. *Singer v. N. Y. Times Co.*, 74 App. Div. 380, 77 N. Y. Supp. 531.

Complaint alleging that the libelous article published in a German newspaper was read by a large number of people, is not insufficient because it fails to allege the articles were understood by those among whom it was circulated to have the meaning claimed for it. The question, as to the persons who could read and understand the alleged libelous articles published in German relates to the amount of damage and not to the sufficiency of the facts alleged. *Peters v. Morning Journal Assn.*, 74 App. Div. 305, 77 N. Y. Supp. 597.

An allegation in a complaint that the article was published of and concerning plaintiff is a sufficient allegation that the article was understood by plaintiff's friends and acquaintances generally as applying to plaintiff. *Stokes v. Morning Journal Assn.*, 72 App. Div. 184, 76 N. Y. Supp. 429.

A complaint setting out a libelous publication reciting that it was published concerning plaintiff, and that the allegations are false and the publication malicious, sufficiently connects plaintiff with the article. *Lehmann v. Tribune Assn.*, 37 Misc. Rep. 506, 75 N. Y. Supp. 1035. So held under the provisions of the Code of Civil Procedure, § 535, holding it is sufficient to state that words were published of and concerning the plaintiff.

A complaint setting forth the libel and alleging its falsity alleged that the libelous statements were made by defendant to be published and that they had been published as intended by him,—Held sufficient allegation of publication. *Thomas v. Smith*, 75 Hun, 573, 27 N. Y. Supp. 589.

In an action for libel an allegation that defendant was proprietor of the newspaper in which the article was published is sufficient. *Hunt v. Bennett*, 19 N. Y. 173.

The complaint alleging false swearing must show that it was

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such as would constitute perjury, if there is nothing in the words connecting them with a judicial proceeding. *Phincle v. Vaughan*, 12 Barb. 215.

Where the words relate to plaintiff in his business or profession, the fact that he is engaged in such business or profession must be averred. *Ramscar v. Gerry*, 16 St. Rep. 789, 1 N. Y. Supp. 635; *Carrol v. Wright*, 33 Barb. 615.

Where the alleged slanderous statement is presumptively privileged, there must be a sufficient averment of malice to sustain the action, and a joint averment that the words were spoken falsely and maliciously is sufficient. *Viele v. Gray*, 18 How. 551.

§ 4. **Special damages must be pleaded.**— To entitle plaintiff to give proof in aggravation of damages, which proof in effect goes to enlarge the character of the libel itself, he must set up the facts in his complaint, and this, although the articles published are libelous *per se*. *Cassidy v. Brooklyn Daily Eagle*, 138 N. Y. 239; *Loftus & Co. v. Bennett*, 68 App. Div. 128, 74 N. Y. Supp. 290, citing *Dumont v. Smith*, 4 Den. 322, to the definition that special damages are such as really took place and are not implied by law, and are either superadded to general damages from an act injurious in itself, as where some special loss arises from uttering the slanderous words actionable in themselves, or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences, and to the rule that where the words are actionable *per se*, evidence of special damage may be given in enhancement of damages, provided it is pleaded, but not otherwise. *Shipman v. Burrows*, 1 Hall, 442; *Herrick v. Lapham*, 10 Johns. 281; *Bell v. Sun Print. & Pub. Co.*, 3 Abb. N. C. 157.

In an action for slander, brought by a woman for words imputing unchastity to her, it is not necessary to allege or prove special damages. If the plaintiff is married, the damages recovered are her separate property. (Code Civ. Proc., § 1906.)

Where the matter is not libelous *per se*, complaint must set forth special damages. *Knickerbocker Life Ins. Co. v. Ecclesine*, 11 Abb. Pr. (N. S.) 385, 42 How. Pr. 201.

But an allegation of special damage to the effect that plaintiff has been injured in his business financially, without stating wherein and how he was damnified, is not sufficient. *Langdon v. Shearer*, 43 App. Div. 607, 60 N. Y. Supp. 193.

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That such allegations must be specific. *Flatow v. Von Bremen*, 19 Civ. Proc. 125.

Where the complaint alleged that by reason of speaking of the words plaintiff was injured in his good name and business, and excluded from the society of his friends and neighbors, it was held that special damages were sufficiently alleged. *Hewit v. Mason*, 24 How. 366.

Where it is necessary to plead special damages, each item thereof must be particularly pleaded. An allegation that "The young lady with whom the plaintiff kept company avoids him," is not libelous since the publication is not an allegation that plaintiff suffered special damages by loss of marriage with her. *Rade v. Press Publishing Co.*, 37 Misc. Rep. 254, 75 N. Y. Supp. 298.

A complaint in slander alleging plaintiff was president of a corporation, and that defendant with intent to injure plaintiff stated plaintiff had cheated an employee of the corporation, is sufficient under sections 481 and 535 of the Code to show that the charge was made against plaintiff as an officer of the corporation, while dealing with one of its employees. *Crandall v. Jacob*, 22 App. Div. 400, 48 N. Y. Supp. 279.

The intent of defendant in publishing the libel may be set out in the complaint upon the question of exemplary damages. *Baldwin v. Genung*, 70 App. Div. 271, 74 N. Y. Supp. 835.

Loss of particular customers is special damage and must be especially alleged to authorize a recovery therefor. *Cruikshank v. Bennett*, 30 Misc. Rep. 232, 62 N. Y. Supp. 118.

Where an action is brought for the publication of words not libelous *per se* it states no cause of action unless it alleges special damage. And an allegation that plaintiff "has suffered great loss and damage in his business" is not sufficient. *Smid v. Bernard*, 31 Misc. Rep. 35, 63 N. Y. Supp. 278.

In an action for slander or libel special damage arising from the loss of customers must be pleaded, and the names of such customers stated; the plaintiff cannot prove that any one not named therein ceased to deal with him. *Loftus & Co. v. Bennett*, 68 App. Div. 128 (131), 74 N. Y. Supp. 290. Stating that the rule in these cases seemed to have been modified in *Bergmann v. Jones*, 94 N. Y. 51.

Where the complaint set out the article which appeared to be libelous *per se* and alleged that "by means of the said publication



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plaintiff was injured in his reputation, business, and credit in the sum of \$10,000," no special damages were pleaded, and evidence that particular persons, firms, and corporations had denied the plaintiff credit was not admissible. *Rembt v. Roehr Publishing Co.*, 71 App. Div. 459, 75 N. Y. Supp. 861.

In an action to recover damages for an alleged libel, which refers to the property of the plaintiffs and not to the plaintiffs themselves, the complaint must allege special damages. *Kapella v. Nichols Chem. Co.*, 83 App. Div. 44.

**SUBDIVISION 2.****The Answer.**

The defenses peculiar to an action of libel are (1) Justification; (2) Fair comment; (3) Privilege. Fraser, 104. To which may be added mitigation, under the Code, § 536.

It is a good defense to an action of libel and slander that the words complained of are true. Fraser, 105.

Judge Ruggles, in *Bisbey v. Shaw*, 12 N. Y. 67, at p. 70, states the rule which existed before the Code of Procedure to be that in the case where a general issue was pleaded alone without a plea of justification, evidence in mitigation of damages was received unless it tended to show the truth of the slanderous words; when it had that tendency it was excluded on the ground that it was admissible only under the plea of justification. The truth of the words could not be proved except under plea of justification. Under the law as it then stood there was no provision by which a defense in mitigation of damages could be put upon the record either in the form of a plea or notice, but it was admissible under the general issue except as above stated, when the facts offered in mitigation tended to prove the truth of the defamatory words.

Where a justification was pleaded it was held to be a deliberate reiteration by the defendant of the slanderous words and to be conclusive evidence of malice. Proof tending to establish the truth of the words was admitted under such a plea, but if it fell short of showing that the slanderous allegation was true, it was disregarded as evidence in mitigation of damages, although it established that the words were spoken in a mistaken belief that they were true, without actual malice, and with honest and even laudable motives. Before the Code, therefore, the defendant could

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not introduce evidence in mitigation of damages to prove the truth of the words complained of. As to present rule, see Code, § 535.

A plea of justification is in the nature of "new matter by way of avoidance" under section 516 of the Code. The allegation of falsity is not traversable, and the defendant must plead the facts which constitute justification. *Scofield v. Demorest*, 55 Hun, 254, 7 N. Y. Supp. 832.

To constitute a good answer in justification it is not enough to state the matter complained of is true; the facts must be shown showing the truth of the statement, whether it is of a general or specific nature. This rule requires only a statement of the necessary facts, and not of the evidence of those facts. The rule is the same in respect to pleading mitigating circumstances. *Ball v. Evening Post Publishing Co.*, 38 Hun, 11, citing *Wachter v. Quenzer*, 29 N. Y. 547, appeal dismissed, 101 N. Y. 641; *McKane v. Brooklyn Citizen*, 53 Hun, 132, 24 St. Rep. 695, 6 N. Y. Supp. 171.

An allegation in an answer that the alleged defamatory matter contained in the article set forth in the complaint was true, with notice that he would prove the truth of it upon trial, constitutes neither defense of justification nor a partial defense of mitigation; to constitute a valid plea of justification the answer must allege, with some particularity, the facts showing that the charges were true in the sense in which they were charged in the complaint; although it seems that a defamatory charge may be of such a nature and so specific that a bare allegation of its truth would constitute a valid defense of justification. *Brush v. Blot*, 16 App. Div. 80, 44 N. Y. Supp. 1073, citing *Wachter v. Quenzer*, 29 N. Y. 547; *Hathorn v. Congress Spring Co.*, 44 Hun, 608; *McKane v. Brooklyn Citizen*, 53 Hun, 132, 6 N. Y. Supp. 171.

And such plea must relate to the charge in the publication construed in the sense understood by people generally, giving to such words their ordinary meaning. *Gray v. Brooklyn Union Publishing Co.*, 35 App. Div. 286, 55 N. Y. Supp. 35.

A plea in justification relating only to the words of the publication which were not libelous, pleading the truth of immaterial matter contained in it which led up to the libel and aggravating the latter by pleading additional defamatory matter is insufficient where the libelous words have no other guilty meaning except that

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charged in the innuendo *Morse v. Press Publishing Co.*, 49 App. Div. 375, 63 N. Y. Supp. 423.

The rule of pleading that the justification in an action of slander shall be as broad as the charge does not mean that an answer in justification must be broad enough to embrace every slanderous charge stated in the complaint. When several separate and distinct things are charged, the defendant may justify as to one, though he fail as to the others.

When a complaint for slander alleges, among other distinct charges, uttered by the defendant, the separate charge that the plaintiff kept a disorderly house, an answer which undertakes to justify that charge is sufficient for that purpose when it contains all the material facts which it would be necessary to allege in an indictment for that offense. *Lanpher v. Clark*, 149 N. Y. 472.

The justification in an action for libel must be as broad as the charges, and the fact that plaintiff published some irritating matter concerning defendant, or his newspaper, does not as matter of law justify the defendant in publishing a libel concerning the plaintiff, although it is properly pleaded in mitigation of damages. *Xavier v. Oliver*, 80 App. Div. 292, 80 N. Y. Supp. 225, citing *Young v. Fox*, 26 App. Div. 261 (267), 49 N. Y. Supp. 634.

It is especially provided by section 535 that in libel and slander the defendant may prove mitigating circumstances, notwithstanding that he has pleaded or attempted to prove a justification.

As to pleading mitigating circumstances in an action for libel or slander, which does not amount to a total defense, see Code Civ. Proc., § 536.

Matter tending to mitigate the damage is a partial defense and may be pleaded as such under section 508. *Bissell v. Press Pub. Co.*, 62 Hun, 551, 17 N. Y. Supp. 393.

Matter in mitigation should be so stated and pleaded. *Hager v. Tibbitts*, 2 Abb. Pr. (N. S.) 97; *Gray v. Brooklyn Union Publishing Co.*, 35 App. Div. 286, 55 N. Y. Supp. 35.

The pleader must state the facts upon which he relies by way of mitigation. *Knox v. Commercial Agency*, 40 Hun, 508.

Allegations in mitigation when in answer to allegation of the complaint should not be struck out as irrelevant, if they present a doubtful element of the admissibility of the evidence. *Palmer v. Palladium Printing Co.*, 16 App. Div. 270, 44 N. Y. Supp. 675.

A defendant cannot allege in mitigation of damages specific acts affecting the character of the plaintiff. *Wuensch v. Morning Jour-*

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*nal Assn.*, 4 App. Div. 110, 38 N. Y. Supp. 605. See also *Holmes v. Jones*, 147 N. Y. 59.

As to limitation of an answer in setting up matter by way of mitigation, see *Hess v. N. Y. Press Co.*, 26 App. Div. 73, 49 N. Y. Supp. 894.

Matters in mitigation may be alleged although scandalous. *Wuensch v. Morning Journal Assn.*, 4 App. Div. 110, 74 St. Rep. 232, 38 N. Y. Supp. 605.

Matter pleaded either as a justification or mitigation in order to be relevant must relate to the particular charge upon which the action was brought. *Zilver v. Cooper*, 37 Misc. Rep. 158, 74 N. Y. Supp. 850.

In an action against defendant for stating that plaintiff had stolen articles from the company in which defendant was a director, in which it was alleged that defendant charged plaintiff with theft, plea on the part of defendant to be relevant must allege that defendant made the charge of theft to the officers or other interested persons in the company in which they, both plaintiff and defendant, were interested. *Zilver v. Cooper*, 37 Misc. Rep. 158, 74 N. Y. Supp. 850.

By section 523 of the Code a verification to a pleading may be omitted where the party pleading would be privileged from testifying as a witness concerning the allegation or denial contained in the pleading, and it is held that it is not necessary to verify the answer in an action for libel, even though the complaint be verified. *Wilson v. Bennett*, 2 Civ. Proc. 34; *Goff v. Star Printing Co.*, 14 Civ. Proc. 3, 21 Abb. N. C. 211.

In the latter case it is held, citing *Wheeler v. Dixon*, 14 How. Pr. 151, that where it is evident from the complaint in the action that the defendant would be privileged from testifying, an unverified answer is good without an affidavit setting out the reason why the pleading is not verified.

For authorities as to what constitutes "Justification" and "Mitigation" respectively, see article IX, "Defenses."

**SUBDIVISION 3.****Demurrer.**

Where any fact alleged in a separate defense in an action for libel is incompetent in mitigation of damages a demurrer to such defense is not well taken without assuming all the facts are not sufficient, but a demurrer lies to a separate defense alleging facts

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in mitigation of damages. *Morse v. Press Publish. Co.*, 63 App. Div. 61, 71 N. Y. Supp. 348.

A demurrer on the ground that the complaint fails to state a cause of action only admits the publication and its falsity, but does not admit the truth of the allegation charging it to be libelous. *Bosi v. N. Y. Herald Co.*, 33 Misc. Rep. 622, 68 N. Y. Supp. 898.

In an action for libel in publishing that plaintiff had leprosy, failing to allege that leprosy was contagious is not ground for demurrer. *Simpson v. Press Publish. Co.*, 33 Misc. Rep. 228, 67 N. Y. Supp. 401.

A plea of justification in libel is demurrable if the justification pleaded is not broad enough to fully justify any single libelous charge. *Baldwin v. Genung*, 70 App. Div. 271, 74 N. Y. Supp. 835.

Where the innuendo is not justified by the antecedent facts referred to, so that rejecting it the words are not actionable, a demurrer will lie. *Fleischmann v. Bennett*, 87 N. Y. 231.

Upon demurrer in libel, allegations by way of innuendo are not admitted, and in contesting the sufficiency of the pleading are to be rejected when not justified by the facts alleged. *Zinserling v. Journal Co.*, 26 Misc. Rep. 591, 57 N. Y. Supp. 905.

If the innuendo is not warranted by the language used in connection with the other facts to which they have relation, a demurrer will be sustained, unless it is a case in which the words without the innuendo are actionable. *Arrow Steamship Co. v. Bennett*, 73 Hun, 81, 25 N. Y. Supp. 1029.

A complaint in an action for slander which alleges that the defendant uttered certain slanderous words which are specifically set forth, "or words of like purport, meaning, or effect" is demurrable as it does not charge that defendant used any particular words. *Drohan v. O'Brien*, 76 App. Div. 265, 78 N. Y. Supp. 430, citing *Battersby v. Collier*, 34 App. Div. 347; *Ward v. Clark*, 2 Johns. 10; *Forsyth v. Edmeston*, 2 Abb. Pr. 30, to the point that in an action for slander the alleged slanderous words complained of must be set forth in the complaint, and is not sufficient to set forth their tenor and effect. Distinguishing *Gray v. Nellis*, 6 How. Pr. 290, where the complaint alleged that certain specific slanderous words were used, continuing with the following statement "and also \* \* \* other words of like falsity and defamation," since in the latter case the complaint does charge the uttering of the specific words as well as other words.

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**SUBDIVISION 4.****Bill of Particulars.**

While the authorities upon the right of plaintiff or defendant to a bill of particulars are quite numerous, they pass in each case upon the facts presented, and it is difficult, if not impossible, to lay down any general rule beyond that stated in the Code, § 531, referred to in *Stiebeling v. Lockhaus*, 21 Hun, 457, which may possibly be termed the leading case upon the subject. It is there said that the language of the Code has been held to cover all classes of actions in which affirmative claims to recover damages are set up, whether they be upon contract or for tort, referring to *Tilton v. Beecher*, 59 N. Y. 176 as authority for the rule that a bill of particulars is proper in all description of actions where the circumstances are such that justice demands that a party should be apprised of the matters for which he is to be put on trial with greater particularity than is required by the rules of pleading. *Stiebling v. Lockhaus*, 21 Hun, 458, was cited and followed in *Gardinier v. Knox*, 27 Hun, 500 (502), distinguishing *Mitchell v. Mitchell*, 61 N. Y. 398.

In *Orvis v. Dana*, 1 Abb. N. C. 268, it was held that the rule in *Tilton v. Beecher*, 59 N. Y. 176, did not require the granting of a bill of particulars in the action for libel then before the court.

In *Dent v. Ryan*, 29 St. Rep. 379, 8 N. Y. Supp. 806, it is held that while a bill of particulars of the times and places where the alleged slanderous words are claimed to have been spoken may be properly ordered, plaintiff should not be required to state the names of the persons in whose presence they have been claimed to have been uttered.

In *Rowe v. Washburne*, 62 App. Div. 131, at p. 132, 70 N. Y. Supp. 868, the rule is laid down that defendant is entitled to a bill of particulars which will inform him more accurately of the place where plaintiff intends to prove the slanderous words were uttered, and also the names of at least one of the persons in whose presence and hearing they were spoken.

To the same effect is *Turner v. Beavan*, 23 Abb. N. C. 432, 10 N. Y. Supp. 128, following *Dempewolf v. Hills*, 53 N. Y. Super. 105.

In *Bertuch v. Dower*, 6 Misc. Rep. 601, 25 N. Y. Supp. 1147,

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where plaintiff had been directed to furnish a bill of particulars of the exact time or times and the precise place or places where defendant is alleged to have spoken the alleged slanderous words, etc., the order appealed from was modified by striking out the words "exact" and "precise."

Defendant in an action of libel is not entitled to a bill of particulars specifying what portions of the article are alleged to be libelous, and in what respect such portions are alleged to be false, and what admitted to be true, where the defendant substantially declares it can answer without a bill of particulars and seeks it that he may be relieved of proving all the issuable facts. *Kuster v. N. Y. Times Co.*, 79 App. Div. 39, 79 N. Y. Supp. 209.

In *Haggerty v. Ryan*, 17 Misc. Rep. 277, 40 N. Y. Supp. 384, the following rules are laid down with regard to bill of particulars in an action for slander. An appeal from an order denying motion for a bill of particulars before answer will not be entertained, where it appears that plaintiff has answered since the making of the order. Such a motion to prevent surprise and for use on the trial is premature when made before issue joined; and, further, that in such an action a bill of particulars specifying the names of the persons in whose presence the words were uttered may properly be ordered.

In *Davidow v. Auerbach*, 15 App. Div. 424, 44 N. Y. Supp. 461, a bill of particulars was asked for where the complaint charged the defendant with slander and libel upon an affidavit made by the defendant containing no denial of the charges of the complaint. For this and other reasons it was held that a bill of particulars should not have been ordered.

In *Hatch v. Matthews*, 85 Hun, 522, 33 N. Y. Supp. 332, citing *Newell v. Butler*, 38 Hun, 106, it is queried whether a bill of particulars should be directed of matter pleaded in mitigation of damages, especially where the plaintiff himself is familiar with the facts.

In *Madden v. Underwriting Print. & Pub. Co.*, 10 Misc. Rep. 27, 30 N. Y. Supp. 1052, a bill of particulars was ordered, and *Ammidon v. Century Rubber Co.*, 59 N. Y. Super. 460, 14 N. Y. Supp. 769, holding that defendant should not be required to furnish a bill of particulars when he denies adequate knowledge of particulars, is distinguished.

The rule governing this class of cases is said in *McCarron v.*

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*Sire*, 14 Civ. Proc. 252, 3 N. Y. Supp. 659, to be that the power of the court to order bill of particulars extends to all descriptions of actions, but that the scope of such an order is ordinarily a question of discretion and that its allowance ought not to go beyond the necessity of the case. Holding that in an action for slander plaintiff may be required to furnish particulars specifying the date when, place where, and in whose presence the alleged defamatory language was used.

A bill of particulars to enable defendant to plead should be refused as unnecessary where it makes affidavit that it has a defense on the merits, and that it is able to justify in part, at least, the truth of the article. Plaintiff cannot be required to furnish a bill of particulars specifying which portion of the objectionable publication he deems to be false, and which part he deems to be true. *Singer v. N. Y. Times Co.*, 74 App. Div. 380, 77 N. Y. Supp. 531.

The defendant may be required to furnish a bill of particulars where he pleads in mitigation or justification. *Daniel v. Daniel*, 2 Civ. Proc. 238. Distinguishing *Maretszek v. Caldwell*, 2 Rob. 715, followed by a note upon the right to a bill of particulars.

In *Holmes v. Jones*, 13 Civ. Proc. 260, it was held that where the defendant in an action for libel sets up matter in justification and also in mitigation, especially where the matter pleaded in mitigation is of facts with which the plaintiff is entirely familiar and with which the defendant is not familiar, there does not seem to be any reason for requiring defendant to give bill of particulars of such mitigating circumstances. Following *Orvis v. Dana*, 1 Abb. N. C. 268, distinguishing *Cardwell v. Cardwell*, 12 Hun, 92; *Stiebling v. Lockhaus*, 21 Hun, 257; *Gardinier v. Knox*, 27 Hun, 500. The principal case further holds that where the affidavit upon which plaintiff moved for a bill of particulars of matters alleged in mitigation, stated that he had no information or knowledge as to particulars of the matters referred to, but did not state that he had no suspicion or belief in regard thereto, it was insufficient.

*Ball v. Evening Post Pub. Co.*, 38 Hun, 11, holds that a defendant in an action for libel, pleading a justification in a proper case, should be required to furnish a bill of particulars. *Orvis v. Dana*, 1 Abb. N. C. 268, is distinguished.

In *Newell v. Butler*, 38 Hun, 104, where defendant had been



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directed to furnish a bill of particulars of a portion of his answer, it was held that he could not be compelled to disclose his evidence, and it was there held that a bill of particulars could not be required as to matters pleaded only in mitigation of damages.

This case and *Ball v. Evening Post Pub. Co.*, 38 Hun, 11, were approved in an action for injunction. *Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co.*, 66 Hun, 38 (40), 20 N. Y. Supp. 749.

In *Tallmadge v. Press Pub. Co.*, 28 St. Rep. 396, 7 N. Y. Supp. 895, it was held that it is well settled that a defendant may be compelled to furnish a bill of particulars of matters set up in a suit for libel; that plaintiff, by delaying nine months after answering, did not waive his right to move where defendant was not prejudiced by the delay. Further, that the order need not be confined to matters charged in the answer, as it is only necessary that defendant furnish particulars of matters he intends to prove.

Where the plaintiff has as good or better sources of information than the defendant, a bill of particulars should not be ordered so as to particularize every detail, much less to apprise plaintiff of defendant's evidence in support thereof. It is sufficient in such case if the charges are specific and formulated with as much certainty as to time, place, and amount as the nature of the case and defendant's situation will admit of. When such facts are specified with sufficient exactness to prevent surprise, plaintiff can ask no more. *Burnham v. Wells*, 50 App. Div. 175, 63 N. Y. Supp. 686.

In *Wynkoop-Hallenbeck-Crawford Co. v. Albany Evening Union Co.*, 26 App. Div. 623, 49 N. Y. Supp. 662, it was held that plaintiff was entitled to a bill of particulars.

In *Childs v. Tuttle*, 48 Hun, 228, the question arose as to granting of a bill of particulars in an action for slander of title to personal property, and it was there held that defendants were entitled to a bill of particulars as to some of the matters claimed, while it was refused as to others.

Where the complaint alleges that by reason of the alleged libel plaintiff was injured in its reputation, good name, and business, and lost various customers, a bill of particulars of the names of customers lost, and of persons of whom the libel was published is not necessary to enable defendant to answer. *National Gramophone Corp. v. American Talking-Machine Co.*, 50 App. Div. 162, 63 N. Y. Supp. 600.

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Where the complaint in an action for libel brought by a physician demands only general damages for injuries "in his vocation" and for exposure "to public contumely" without claim for special damages a bill of particulars of the names of the patients he has lost by the libel should not be ordered as there can be no recovery on such a complaint for special damages. *Cruikshank v. Bennett*, 30 Misc. Rep. 232, 62 N. Y. Supp. 118.

## FORMS.

## SUPREME COURT — DUTCHESS COUNTY.

MARY B. DISTIN

agst.

HILAND R. ROSE.

Complaint (slandorous words),  
69 N. Y. 122.

The plaintiff for her complaint says:

That the defendant, during the months of March and February, 1873, on divers days, contriving and wickedly and maliciously intending to injure this plaintiff in her good name, fame, and credit, and to bring her into public scandal, infamy, and disgrace with and among all her neighbors and other good and worthy citizens, and to cause it to be suspected and believed by those neighbors and citizens that the said plaintiff had been and was guilty of the offenses and misconduct hereinafter mentioned to have been made and charged upon her by said defendant, did, at the time aforesaid, at Poughkeepsie, in a certain discourse which the defendant thus and there had in the presence and hearing of divers good and worthy citizens, falsely and maliciously spoke and declared of and concerning the said plaintiff, these false and scandalous, malicious, and defamatory words following, that is to say: (Here follows defamatory statements.)

By means of the committing of which said several grievances by the said defendant as aforesaid, the said plaintiff has been and still is greatly injured in her good name and credit, and brought into public scandal, infamy, and disgrace with and amongst all her neighbors and other good and worthy citizens to damage, of this plaintiff of \$1,000.

WHEREFORE plaintiff demands judgment against this defendant for the sum of \$1,000, besides the costs of this action.

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## SUPREME COURT — WESTCHESTER COUNTY.

MICHAEL FITZGERALD

*agst.*

JOHN GEILS.

Complaint (affecting business capacity), 84 Hun, 295.

The plaintiff above named, complaining of the above-named defendant, respectfully shows to the court, and alleges:

*First.* That at all times mentioned in this complaint, both he and the defendant have been and now are residents of the county of Westchester and State of New York.

*Second.* That between the 1st day of October, 1892, and the 1st day of May, 1893, at divers times in the village of New Rochelle, Westchester county, N. Y., and vicinity, the defendant in the presence and hearing of a number of persons maliciously spoke of and concerning the plaintiff the false and defamatory words following: "The plaintiff is a drunkard;" "and by reason of plaintiff's drunkenness he is no good any more as a mechanic."

*Third.* That plaintiff's only means of supporting himself and his family is as a carpenter and builder.

WHEREBY the plaintiff was injured in his reputation and business to his damage \$5,000.

WHEREFORE plaintiff demands judgment against the defendant for \$5,000, with the costs of this action.

## SUPREME COURT — YATES COUNTY.

EMMA E. ENOS

*agst.*

JOHN A. ENOS.

Complaint (imputing unchastity), 135 N. Y. 609.

Complaining of the defendant the plaintiff states and alleges the following facts constituting her cause of action:

That this plaintiff is and always has been of good character, and a good, true, and honest woman, and never was guilty of the offenses laid to her charge by the defendant, and at the times hereinafter mentioned, had the respect, confidence, and esteem of her neighbors and of all good and worthy citizens.

And the plaintiff alleges on her information and belief, and

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charges the fact to be that the defendant herein, wickedly contriving and maliciously intending to injure this plaintiff in her good name, fame, and credit, and to bring her into public scandal, infamy, and disgrace with and among all her neighbors, and other good and worthy citizens, to cause it to be suspected and believed that the plaintiff had been and was guilty of the offenses and misconduct hereinafter mentioned to have been made and charged upon her, by said defendant, did, during the years 1886, 1887, and 1888, and during each and every month of the same years and each of them, at his residence in the town of Jerusalem, Yates county, N. Y., and at divers other places in said town, and also in the public streets of the village of Penn Yan, and at divers other places in the county of Yates, and in the presence and hearing of divers good and worthy citizens, falsely and maliciously speak and declare of and concerning the plaintiff: (Here follows defamatory words.)

And many other vile, obscene, and indecent expressions of and concerning the plaintiff, thereby charging and maliciously intending to charge and have it believed that the plaintiff was an unchaste woman and had been and was guilty of the crime of larceny.

That by reason of the committing of the said several grievances by the said defendant as aforesaid, the said plaintiff has been and still is greatly injured in her good name and credit, and brought into public scandal, infamy, and disgrace with and among all her neighbors and other good and worthy citizens to the damage of the plaintiff of \$5,000.

WHEREFORE the plaintiff demands judgment against the defendant in the sum of \$5,000, besides costs.

## SUPREME COURT — COUNTY OF KINGS.

WILLIAM J. CRUIKSHANK, Plaintiff,

*agst.*

WILLIAM GORDON, Defendant.

Complaint (affecting professional capacity), 118 N. Y. 117.

The plaintiff, for his complaint against the defendant, alleges:

*First.* That at the times hereinafter mentioned the plaintiff was and still is a practicing physician, duly authorized and licensed to practice his said profession, and residing and having an office in the city of Brooklyn, in this State.

*Second.* That on or about the 9th day of June, 1885, the defendant, as the plaintiff is informed and believes, in the presence of one Peter I. Hoffman, in the city of Brooklyn, with intent to injure this plaintiff

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in his profession as a physician, spoke certain false and defamatory language in the following words: "I" (meaning the defendant), "discharged Doctor Cruikshank" (meaning this plaintiff) "because he had nearly killed my daughter and had treated her for malaria when she did not have malaria at all, and I shall never pay him a single cent. Doctor Cruikshank would have killed her if I had not discharged him and called in another doctor."

*Third.* And for a further and separate cause of action the plaintiff repeats the allegations in paragraph one herein contained, and alleges further that on or about the 1st day of November, 1885, the defendant, as the plaintiff is informed and believes, in the presence and hearing of one Annie Snyder, in the city of Brooklyn, with intent to injure this plaintiff in his profession as a physician, maliciously spoke and uttered concerning this plaintiff in his said profession to the said Annie Snyder certain false and defamatory language in the following words: "If you" (meaning the said Annie Snyder) "do not get another doctor" (meaning another physician than this plaintiff), "you will be your own child's murderer." (The said Annie Snyder having at the time of said conversation a sick child, and having called this plaintiff to attend the same as a physician, and this plaintiff being at said time in attendance upon the said child, and having the care of it as a patient.) "It shows that Doctor Cruikshank" (meaning this plaintiff) "knows nothing about the case, because if he did he would syringe the child's throat. I" (meaning the defendant) "had Doctor Cruikshank for my family and he almost killed my child, and if I had not got another doctor in his place my child would have died. You ought to get another doctor immediately. I wish your husband were at home so I could speak to him about it, and urge him to get another doctor. Doctor Cruikshank has sued me, but you can tell him I do not care that for him" (meaning that the defendant was wholly indifferent to any suit brought by this plaintiff or any claim for legal redress made by him). "I would never risk a child in his care."

*Fourth.* And for a further and separate cause of action the plaintiff repeats the allegations of paragraph one, hereinbefore contained, and alleges further that on or about the 1st day of November, 1885, the defendant, as the plaintiff is informed and believes, in the presence and hearing of one George Snyder, in the city of Brooklyn, with intent to injure this plaintiff in his profession as a physician, maliciously spoke and uttered concerning this plaintiff in his said profession, to the said George Snyder, certain false and defamatory language in the following words, this plaintiff being at said time in attendance as a physician upon a child of said George Snyder, and having the care of the same as a patient: "If I" (meaning defendant) "were you" (meaning the said George Snyder), "I would get another doctor" (meaning another physician than this plaintiff); "Doctor Cruikshank" (meaning this plaintiff) "is no good of a doctor. He is nothing but a butcher. I have had Doctor Cruikshank in my

## Art. 11. Pleading.

family to attend my child, and if I had not got another doctor in his place I would have had a death in my family. I intend to do Doctor Cruikshank all the harm I can."

(Here follow similar allegations in presence of other persons.)

*Eighth.* That by means of said false, malicious, and defamatory words uttered as aforesaid, to the various persons hereinbefore named, and at the times and places therein named, the plaintiff was caused trouble, inconvenience, and injury and has been damaged in the sum of \$20,000.

WHEREFORE this plaintiff demands judgment against the defendant for the sum of \$20,000, besides the costs of this action.

## NEW YORK SUPERIOR COURT.

RICHARD G. FOWLES

*agst.*

HENRY C. BOWEN.

Complaint (words affecting  
business reputation), 30 N.  
Y. 20.

The amended complaint of the plaintiff, Richard G. Fowles, against the defendant, Henry C. Bowen, shows and states to the court:

(1) That on the 1st day of January, 1852, he entered into the employ of the firm of George M. Wood, merchant, doing business in the city of Cincinnati, in the State of Ohio, and continued in the employ of said firm until he was discharged as hereinafter mentioned.

(2) That at the time last aforesaid the said defendant was a merchant doing business in the city of New York, and one of the firm of Bowen & McNamee, of said city, and that previously to said day the said plaintiff had been for a long time in the employ of said Bowen & McNamee as a clerk.

(3) That while he was in the employ of the said George M. Wood, and on or about the 26th day of February, 1852, the above defendant, at the city and county of New York, in a communication with one Jacob F. Cole, who at the time was a member of the said firm of said George M. Wood, spoke and published of and concerning the plaintiff the following false, scandalous, and defamatory words, that is to say: "Mr. Fowles" (meaning the plaintiff) "has become such a notorious liar that we can place little or no confidence in him. In fact so strongly were we convinced of his dishonesty that we have written to John Shilletto of Cincinnati to employ a police force to watch him. This course was brought about from the fact of Fowles" (meaning the plaintiff) "having some six trunks in his possession when he left New York."

## Art. 11. Pleading.

(4) That the said defendant on the 28th day of February, 1852, at the city of New York, in the presence and hearing of divers persons, spoke and published of and concerning the said plaintiff the following false, scandalous, and defamatory words, that is to say: "Mr. Fowles" (meaning the said plaintiff) "has become such a notorious liar that we" (meaning the said firm of Bowen & McNamee, of which said defendant was a member) "could place little or no confidence in him" (meaning the said plaintiff). "In fact so strongly were we" (meaning the said firm of Bowen & McNamee, of which the defendant was a member) "convinced of his" (meaning the said plaintiff's) "dishonesty, that we" (meaning the said firm of Bowen & McNamee, of which the defendant was a member) have written to John Shilletto, of Cincinnati, to employ a police force to watch him" (meaning the said plaintiff). "This course was brought about from the fact of Fowles" (meaning the said plaintiff) "having some six trunks in his" (meaning the said plaintiff's) "possession when he left New York."

(5) That the words were uttered and published by the said defendant with the intent to injure and defame the said plaintiff, and by reason of the speaking thereof the said plaintiff is greatly prejudiced in his good name, fame, credit and reputation, and was suspected of being a dishonest man and a liar, and unworthy of confidence, and was in consequence of the speaking of the words aforesaid discharged from the employ of the said firm of George M. Wood as such clerk, and was then and since has been deprived of the gains and profits of the said employment, and in consequence thereof has since been unable to obtain any employment.

(6) The plaintiff, therefore, says that he is injured and has sustained damage to the amount of \$25,000, for which he claims judgment, besides the costs of this action.

NOTE.— This complaint illustrates the method of pleading innuendoes under older decisions.

## SUPREME COURT — KINGS COUNTY.

IDA M. GARRISON

*agst.*

THE NEW YORK RECORDER COMPANY.

Complaint (libel), 155 N. Y.  
228.

The plaintiff, by William G. Cooke, her attorney, complaining of the defendant herein, respectfully shows to this court:

(1) That she is the wife of Theodore B. Garrison, having been married to him in the city of Brooklyn on the 28th day of June, 1893, in which city she then began, and intended thenceforth to reside with her husband, she being at that time unknown to the citi-

## Art. 11. Pleading.

zens of Brooklyn and never having resided there; that at the time of her marriage she was of the age of thirty-four years and for several years prior thereto had been a teacher in the public schools of the State, and had never been engaged in any other vocation or occupation whatsoever, and had always enjoyed the society, friendship, and confidence and respect of good, sober, and respectable men and women.

(2) That the defendant is a domestic corporation organized under the laws of this State, and at the city of New York publishes a daily newspaper called "The New York Recorder," which is largely circulated among and read by the citizens of the cities of New York and Brooklyn, as well as of the whole country.

(3) That on the 1st day of June, 1893, the defendant maliciously designing to injure this plaintiff in her good name, fame, and credit, and to disgrace her and hold her up to public contempt, infamy, scorn, and ridicule, and to deprive her of the society of all good, sober, and respectable people, and to make it appear that she was, or had been a vile, abandoned, and dissolute person, and to be shunned by all those persons and citizens of Brooklyn and elsewhere who were not the lowest and most degraded, did publish in said newspaper, and caused to be circulated in the city of Brooklyn and elsewhere, the following false, scandalous, and malicious libel, of and concerning the plaintiff, to wit: (Here follows article complained of.)

(4) That the plaintiff is informed and believes, and there alleges, that a "concert hall at Coney Island" is a place of evil report and a resort for disorderly and disreputable persons of both sexes; and that the female singers and dancers therein are generally depraved and abandoned women, or are so regarded and understood to be, and as such are shunned and avoided by orderly and respectable people.

(5) That by reason of the publication and circulation aforesaid plaintiff has ever since been and still is greatly distressed in mind and injured in name, fame, and reputation, and subjected to great disgrace, to her damage of \$25,000, for which sum she demands judgment herein, besides the costs of this action.

## SUPREME COURT — ALBANY COUNTY.

SMITH O'BRIEN, Plaintiff,

*agst.*

JAMES GORDON BENNETT, Defendant.

Complaint alleging special  
damages, "libel," 72 App.  
Div. 367.

The above-named plaintiff, complaining against the above-named defendant, alleges:

*First.* That at the times hereinafter mentioned the defendant was,



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and now is, the editor, publisher, and proprietor of the New York Herald, a newspaper published at the city of New York, State of New York.

*Second.* That on or about the 9th day of June, 1899, the defendant maliciously composed, or caused to be composed, and maliciously published of, and concerning the plaintiff in said newspaper a certain article containing false, defamatory, and libelous matter following, to wit: (Here follows article complained of.)

*Third.* That by means of said publication the plaintiff was injured in his reputation to his damage of thirty thousand dollars (\$30,000).

*Fourth.* That at the times hereinbefore mentioned the plaintiff was and now is a practicing lawyer and attorney, duly authorized to practice in the courts of this State, and practicing his profession at Albany, N. Y., and was of good name and credit as such lawyer and attorney.

*Fifth.* That by means of the publication aforesaid the plaintiff was injured in his reputation and in his good name and credit as such lawyer and attorney, to his damage \$10,000.

WHEREFORE, plaintiff demands judgment against the defendant herein for the sum of forty thousand dollars (\$40,000), besides the costs of this action.

## SUPREME COURT — DELAWARE COUNTY.

WILLIAM YOUNANS

*agst.*

SHERILL E. SMITH and GEORGE H.  
PAINE.

Complaint, "libel," 153 N. Y.  
214.

The plaintiff, William Youmans, for a complaint in this action, shows the court that he is a resident of the town of Delhi, Delaware county, N. Y., and has been for forty-five years, and has always endeavored to maintain a good character and reputation among his neighbors and friends, and is and has been for over forty years a practicing attorney and counselor-at-law in said town and county.

*First.* And the plaintiff further shows that the defendants are the editors and publishers of a public newspaper called the "Delaware Gazette," published at Delhi, in said county, and has a large circulation.

*Second.* And the plaintiff for a further complaint shows the court that the defendants, George H. Paine and Sherill E. Smith, being co-partners in the printing and publishing business at Delhi aforesaid, and being malicious toward this plaintiff, and with the wicked design and intent to injure this plaintiff's good name, character and reputation and standing in the community in which he lives, and to

## Art. 11. Pleading.

cause it to be suspected and believed that this plaintiff was a bad, dishonest, corrupt, and wicked man, and unworthy of the confidence and esteem of his neighbors and friends as an individual, and also as an attorney and counselor-at-law; that he was unworthy of confidence and not to be trusted by his clients, or to be believed under oath, did wickedly publish, utter, and circulate amongst the people of Delaware county and State of New York, the following scandalous, libelous articles and questions, to wit: (Here follows libelous matter.)

*Third.* And the plaintiff further shows the court that the defendants by the various questions thus published and circulated charged and intended to charge this plaintiff with the various crimes, misdemeanors, and bad character indicated by each and every question therein published as aforesaid.

*Fourth.* And the plaintiff further shows that the above questions or interrogatories were printed and published by the defendants, Paine and Smith, in their printing and publishing office, in Delhi, both privately and through the post-office, and mailed, issued, delivered, and circulated by the defendants or parties and persons who were engaged in the attempt to slander, vilify, and libel this plaintiff as aforesaid.

*Fifth.* And the plaintiff further shows the court that by reason of such false, malicious, and slanderous printing and publishing his clients have abandoned him, and by reason thereof his law business has been diminished and his clients left him to his great damage.

*Sixth.* And the plaintiff further shows the court that by reason of the foregoing charges and libelous publication this plaintiff has sustained damages to his private and professional character, to the amount of \$25,000.

WHEREFORE, and by reason of the premises the plaintiff demands judgment for \$25,000, besides the costs of this action.

## NEW YORK SUPERIOR COURT.

RICHARD G. FOWLES

*agst.*

HENRY C. BOWEN.

Answer, 30 N. Y. 20.

The answer of the defendant, Henry C. Bowen, to the amended complaint of the plaintiff, Richard G. Fowles, in this action:

(1) That the plaintiff on the 1st day of January, 1852, did not enter into the employ of the firm of George M. Wood, as stated in the said complaint, nor did he continue in such employment until he was discharged, as stated in said complaint.

(2) That the plaintiff was in the employ of the firm of Bowen &

## Art. 11. Pleading.

McNamee from the 1st of September, 1849, to the 1st of November, 1851, and at no other time.

(3) That the defendant did not on or about the 26th of February, 1852, in a conversation with one Jacob F. Cole, speak and publish of and concerning the plaintiff the words stated and set forth in the said complaint, or any of them.

(4) That the defendant did not, on or about the 26th of February, 1852, in the presence and hearing of any person speak and publish of and concerning the plaintiff the words stated and set forth in the plaintiff's complaint, or any of them.

(5) That all the conversation had by the defendant on or about the 26th or 28th of February, 1852, or at any other time with Jacob F. Cole, was privileged conversation, occasioned by remarks made by said Jacob F. Cole of and concerning the character and integrity of the plaintiff, and that no part of the communication made by the defendant to the said Jacob F. Cole was false, scandalous, or defamatory of or concerning the plaintiff.

(6) That the plaintiff, while he was in the employ of Bowen & McNamee, as aforesaid, became such a notorious liar, that the said firm could place little or no confidence in him.

(7) That the words stated and set forth in the said complaint were not uttered or published by the said defendant with a view to injure or defame the said plaintiff, nor by reason of the speaking thereof was the plaintiff prejudiced in his good name, fame, or credit or reputation, nor was he suspected thereby of being a dishonest man or a liar, or unworthy of confidence, nor was he in consequence of the speaking of the words aforesaid discharged from the employ of the said George M. Wood as such clerk, nor was he thereby deprived of the gains and profits of the said employment, nor has he in consequence thereof since been unable to obtain employment.

## SUPREME COURT—DUTCHESS COUNTY.

MARY B. DISTIN

*agst.*

HILAND R. ROSE.

Answer (justification and mitigation), 69 N. Y. 122.

*First.* The above-named defendant in his amended answer to the complaint of the plaintiff in the above-entitled action denies each and every allegation in said complaint contained.

*Second.* And for another and further answer to plaintiff's complaint in this action the defendant states and claims that at the time

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of the alleged speaking of the words complained of in the plaintiff's complaint, and during many months before and after the time mentioned in said complaint, the defendant was one of the trustees of school district No. 7, of the town of Poughkeepsie, duly elected and acting as such, and that all the words spoken by the defendant of and concerning the plaintiff was in the meeting of the said trustees or to the other trustees of said school district in relation to the character and fitness of the plaintiff to teach and take charge of said district school.

*Third.* And for another and further answer to the plaintiff's complaint in this action the defendant alleges that the plaintiff had been the companion of one Louis G. Contarini during several years prior to the alleged speaking of the words contained in the plaintiff's complaint, and claimed to be the wife of said Contarini, and visited the said Contarini in prison, as his wife, and lived and cohabited with the said Contarini as his wife, both before and after she had been informed that said Contarini had a wife living, which facts and circumstances defendant will prove on the trial of this action as a justification of the truth of the words alleged to be spoken in the plaintiff's complaint, and defendant will also further prove all the above facts and circumstances in this action in mitigation of damages.

*Fourth.* And for another and further defense in this action the defendant alleges that the words mentioned and set forth in the plaintiff's complaint in this action are true, and that the misconduct charged by said words the plaintiff was guilty of; that she, the plaintiff, cohabited and lived with one Louis G. Contarini a long time before the commencement of this action, and claimed to be his wife; that Contarini was, at the time when the plaintiff cohabited and lived with him as his wife, a married man, having a lawful wife, other than the plaintiff, living, which fact was well known to the plaintiff; that the words alleged to be spoken by the defendant were spoken by him in relation to the plaintiff's conduct with said Contarini, and that plaintiff's character in consequence of her connection with said Contarini became and was bad at the time of the alleged speaking of the words mentioned in the plaintiff's complaint, which facts and circumstances the defendant will prove on the trial of this action in justification of the alleged speaking and also in mitigation of damages in this action.

*Fifth.* And defendant further alleges as a defense in this action that said Louis G. Contarini was duly indicted and was duly convicted of the crime of bigamy in the city of Poughkeepsie, Dutchess county, at a Court of Oyer and Terminer, held in said city on the 10th of October, 1871, and duly sentenced under said conviction to the State prison; that after said Contarini had served out said sentence, or had been discharged, the plaintiff again sought him and lived and cohabited with him as his wife, which facts and circumstances the defendant will prove on the trial of this action in justification of the

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words alleged to have been spoken by him, and also in mitigation of damages in this action.

## SUPREME COURT — JEFFERSON COUNTY.

CHARLES T. WOODRUFF

*agst.*

THE BRADSTREET COMPANY.

Answer (plea of privilege), 116  
N. Y. 217.

(Certain admission made by defendant.)

And the said defendant, for a separate and further defense and in mitigation of damages, avers:

(1) That it is a corporation duly incorporated under and by virtue of the laws of the State of Connecticut, and does business in the State of New York and elsewhere.

(2) That its principal place of business is in the city of New York, and that its business is of the nature and character set forth in said amended complaint.

(3) That in pursuance of its business as a commercial agency it was, at the time set forth in the said amended complaint, and still is hired and employed by divers corporations, firms, and individuals, doing business in the State of New York and elsewhere, which said corporations, firms, and individuals were, and are interested in ascertaining and being informed of the commercial standing of divers corporations, firms, and individuals, doing business in the State of New York and elsewhere, as their agent, to seek for and diligently inquire into the character, credit, and commercial standing of said parties so engaged in business as aforesaid, and to communicate the same forthwith to their said employers, all of which communications were to be in strict confidence and were to be for the sole use, benefit, and information of said employers.

(4) That in pursuance of said employment the said defendant was informed by the president of a bank located at Watertown, and which information it verily believed was true, that C. T. Woodruff and J. Sterling Robinson formed the firm of Woodruff & Robinson, and had succeeded the firm of Woodruff & Wilson.

(5) That relying upon the correctness of said information, and believing that the initials of the Woodruff who was a member of said firm were C. T., instead of C. E., and the said defendant having received certain trusty information that the members of the said firm of Woodruff & Robinson, which had been dissolved on or about October 1, 1881, had been sued for a large sum of money, upon which part payment had been made, and being informed by one of its own agents

## Art. 12. Evidence.

that a judgment had been recovered against said J. S. Robinson and C. T. Woodruff, it in good faith, and in pursuance of the duty and contracted obligation to its employers, made the publication in the words and figures fully and at length set forth in the amended complaint, and sent the same to its said employers as a confidential communication. That the said defendant did not refer to the said plaintiff at all and made the said publication in entire good faith, and without any malice actuating it in the premises.

(6) And the said defendant further answering avers, upon information and belief, that the said plaintiff has not been injured in money or credit by means of said publication, but that to the contrary thereof he has sustained no loss or damage in the premises whatsoever.

WHEREFORE defendant prays that the amended complaint herein may be dismissed, with costs.

## ARTICLE XII.

## EVIDENCE.

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## SUBDIVISION 1.

## Identity of Plaintiff.

If a libel does not designate plaintiff by name, he may show by extrinsic facts that persons reading it would apply it to him. *Robertson v. Bennett*, 44 N. Y. Super. 66.

Where the article complained of does not designate plaintiff he must show, in order to maintain his action, such extrinsic facts as render it clear that a person who knew him would, on reading the article, apply it to him. *Miller v. Maxwell*, 16 Wend. 7.

Where a libelous article did not name the plaintiff, testimony of witnesses that identify plaintiff as the person referred to was held to be incompetent. *Gibson v. Williams*, 4 Wend. 320; *Van Vechten v. Hopkins*, 5 Johns. 211; *Maynard v. Beardsley*, 7 Wend. 560. Where the article does not refer to the plaintiff by name

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proof may be given showing that the circumstances referred to are descriptive of him and his surroundings. *Stokes v. Morning Journal Assn.*, 66 App. Div. 569, 73 N. Y. Supp. 245, citing *Ryckman v. Delavan*, 25 Wend. 186; *Sanderson v. Caldwell*, 45 N. Y. 398; *O'Brien v. Bennett*, 72 App. Div. 367, citing *People v. Parr*, 42 Hun, 314; *Clary-Squire v. Press Publishing Co.*, 58 App. Div. 362, 68 N. Y. Supp. 1028, distinguishing *Stafford v. Morning Journal Assn.*, 68 Hun, 467, 22 N. Y. Supp. 1008.

In *Clary-Squire v. Press Publishing Co.*, 58 App. Div. 362, it was held that it was incompetent to call witnesses to the identity of a picture claimed to be that of plaintiff, and it seems, evidence of experts on that point is inadmissible. This case is cited and followed *O'Brien v. Bennett*, 72 App. Div. 367.

Where a libel does not name the plaintiff he may give evidence of all the surrounding circumstances and other extraneous facts which will explain and point out the person to whom the allusion applies. Where a newspaper libel, not naming the plaintiff, is based on articles naming the plaintiff, previously published on the same day as other newspapers, having a general circulation in the same community, plaintiff may give such articles in evidence, when tending to prove the condition of the public mind and the means of information the public had, as attending circumstances indicating the article complained of referred to plaintiff. *Van Ingen v. Mail & Express Pub. Co.*, 156 N. Y. 376.

Where the charge was made against another than plaintiff in a former article, and in the later one this was corrected, and plaintiff was stated to be the person charged, it was held competent to prove both articles. *Grant v. Herald Co.*, 42 App. Div. 354, 59 N. Y. Supp. 84.

## SUBDIVISION 2.

## Publication, Repetition, and Retraction.

In *Potter v. N. Y. Evening Journal Pub. Co.*, 68 App. Div. 95, 74 N. Y. Supp. 317, question of what evidence is necessary to show publication is considered and passed upon.

It is immaterial that the publisher of a newspaper was out of the country at the time of the allegation complained of, or that he had made rules that no article should be published concerning the reputation of an individual or corporation until after strict investigation the truth had been ascertained. *Morgan v. Bennett*, 44 App. Div. 323, 60 N. Y. Supp. 619, citing *McMahon*

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*v. Bennett*, 31 App. Div. 16, 52 N. Y. Supp. 390, followed *O'Brien v. Bennett*, 59 App. Div. 623, 69 N. Y. Supp. 298.

The rule is that the same or similar words to those counted on in the complaint and spoken before the commencement of the action may be given in evidence. *Cassidy v. Brooklyn Eagle*, 138 N. Y. 239 (242).

Neither the repetition of the libel, nor the publication of other libelous matter, after the commencement of the action can be proved therein for any purpose. *Eccles v. Radam*, 75 Hun, 535, 27 N. Y. Supp. 486.

Evidence that the article was repeated after action therefor was begun is not competent. *Stuart v. N. Y. Herald Co.*, 73 App. Div. 459, 77 N. Y. Supp. 216.

A retraction actually published after the commencement of an action it seems may be proved in mitigation of damages, but an offer of retraction is not available as a defense. *Turton v. N. Y. Recorder Co.*, 144 N. Y. 144.

A subsequent publication, however, not retracting the libelous charge but merely attempting to construe it in a different sense from that formerly imputable is not admissible. *Hotchkiss v. Oliphant*, 2 Hill, 510.

Evidence that plaintiff applied to the editor of the paper for a retraction of the publication which was libelous *per se*, and that such request was refused, is competent on the question of express malice, as is also evidence that defendant published the article without investigation. These facts are sufficient to justify the jury in finding express malice which is essential to an award of exemplary damages. *Stokes v. Morning Journal Assn.*, 72 App. Div. 184, 76 N. Y. Supp. 429.

A Repetition or Retraction has a bearing on Malice, see cases under subdivision 5, "Malice."

## SUBDIVISION 3.

## Justification.

In the early case of *King v. Root*, 4 Wend. 113, the rule was approved that "All that is libelous in the publication must be justified. Damages must be given for such part, if any, as the defendants fail to support." And in *Holmes v. Jones*, 121 N. Y. 469, this rule was followed where, in referring to a certain charge of the libelous article, the court said: "Unless the de-



## Art. 12. Evidence.

fendant could justify that charge, even if he could have justified all the rest of the publication, the plaintiff would have maintained his action and been entitled to recover some damages." So also in the recent case of *Young v. Fox*, 26 App. Div. 261, it was said, citing *Holmes v. Jones*, *supra*: "We must recall the rule that it is not enough to prove part of a libelous publication to be true, but the proof must be as broad as the charges." *Collis v. Press Publishing Co.*, 68 App. Div. 38 (42).

When the answer to the complaint of a woman for slander, alleging, among other distinct and separate charges, that the defendant had charged her with keeping a disorderly house, sets up a justification to that charge, the defendant is entitled to give, in support of such justification, proof of specific acts of lewdness or immorality on the part of the plaintiff, tending to show that her house was in fact disorderly; and this is so, although the answer may not be sufficient to admit proof of specific acts in mitigation, under section 536 of the Code of Civil Procedure. *Lanpher v. Clark*, 149 N. Y. 472.

In the following cases evidence was held inadmissible as to matters other than those set up by way of justification, it being held that evidence is not admissible as to the truth of any matter other than those charged in the complaint. *Cole v. Perry*, 8 Cow. 214; *Gorton v. Keeler*, 51 Barb. 475; *Haddock v. Naughton*, 74 Hun, 390, 26 N. Y. Supp. 455; *Hall v. Naylor*, 18 N. Y. 588; *Palmer v. E. P. Bailey & Co.*, 12 App. Div. 6, 42 N. Y. Supp. 933.

The rule that plaintiff must prove his allegations beyond a reasonable doubt where justification was interposed to a criminal charge, does not apply to civil causes. *Lewis v. Shull*, 67 Hun, 543, 51 St. Rep. 337, 22 N. Y. Supp. 484.

See "Justification" under article "Defenses."

## SUBDIVISION 4.

## Special Damage, Mitigation, etc.

Where plaintiff claimed that the article published as to an attachment issued against him was not a fair report, and that it resulted in injury to his credit, evidence that his landlord sought thereby to cancel his lease, and that the electric light in plaintiff's store was discontinued, and he was obliged to pay cash for adver-

## Art. 12. Evidence.

tisements was inadmissible where there was no complaint as to such special damages. *Loftus & Co. v. Bennett*, 68 App. Div. 128, 74 N. Y. Supp. 290.

It is not competent to show that plaintiff has sustained a general loss of reputation and suffered material injury in consequence of words complained of. *Herrick v. Lapham*, 10 Johns. 281.

In an action for slander or libel special damage arising from the loss of customers must be pleaded, and the names of such customers stated; the plaintiff cannot prove that any one not named therein ceased to trade with him. *Loftus & Co. v. Bennett*, 68 App. Div. 128 (131), stating that the rulings in the earlier cases seem to have been modified in *Bergmann v. Jones*, 94 N. Y. 59.

It was said in note to *Updyke v. Weed*, 18 Abb. 223, that if there is no denial in the answer evidence of special damage may be given though not averred.

Where it is necessary to show special damage caused by slanderous words, such damage must be shown to have occurred before suit brought. *Keenholts v. Becker*, 3 Den. 346.

Where an alleged libelous publication contained charges injurious to plaintiff's character and to his business and the complaint averred that by reason of the libel, plaintiff had been greatly injured in his business, by the loss of good-will and patronage, plaintiff was permitted to testify as a witness that immediately after the publication his business fell off, and to state the amount of his daily sales up to and immediately after such publication. *Bergmann v. Jones*, 94 N. Y. 51.

That defendant was indemnified for publishing the libel is not admissible in aggravation. *Hotchkiss v. Lathrop*, 1 Johns. 286.

Where an action for slander was based upon words charging a married woman with unchastity, it was held competent for plaintiff, in bearing upon the question of damages, to prove that she had a family of young children. *Enos v. Enos*, 135 N. Y. 609, affirming 58 Hun, 45, 11 N. Y. Supp. 415.

Where special damages were asked for because of injury to plaintiff's business the consequence of a libelous publication, plaintiff was allowed to testify on his own behalf as to the falling off of his business immediately after the publication. *Daniel v. News Publishing Co.*, 51 St. Rep. 18, 21 N. Y. Supp. 862, affirmed 142 N. Y. 660.

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Plaintiff gives evidence of malice when he proves the falsity of the libel, and it then becomes a question for the jury whether the malice is of such a character as to call for exemplary or punitive damages, and the question is not to be taken away from the jury because defendant gives evidence which tends to show that there was in fact no actual malice. *Gray v. Sampers*, 35 App. Div. 270, 55 N. Y. Supp. 3, citing *Samuels v. Evening Mail Association*, 75 N. Y. 604, which affirms judgment on verdict on dissenting opinion in General Term reported 9 Hun, 288. *McFadden v. Morning Journal Assn.*, 28 App. Div. 508, 51 N. Y. Supp. 275.

Former controversies between the parties having nothing to do with the slander can have no legal tendency to mitigate the damages. *Lister v. Wright*, 2 Hill, 320.

The matter that will serve to mitigate damages in an action of libel must be connected with or bear upon the defamatory charge, i. e., matter tending to prove the truth of the charge, or to show that there was induced in the defendant a belief of its truth, or prior publications of the plaintiff of such a nature as to exasperate and to call forth bitterness in reply. *Hamilton v. Eno*, 81 N. Y. 116.

Defendant cannot prove in mitigation a former recovery of damages against him by the same plaintiff in another action for libel which formed one of a series, and published in the same paper, and containing the libelous words charged in the second action. *Tillotson v. Cheetham*, 3 Johns. 56.

Facts competent in mitigation must be such as were known to and believed by defendant before he uttered the slander. *Hatfield v. Lasher*, 81 N. Y. 246, affirming 17 Hun, 23; *Grant v. Herald Co.*, 42 App. Div. 354, 59 N. Y. Supp. 84.

To defeat or mitigate a claim for exemplary damages defendant may introduce any evidence, the legal tendency of which is to show that he was not actuated by a wanton or malicious purpose. *Collis v. Press Pub. Co.*, 68 App. Div. 38, 74 N. Y. Supp. 78.

To constitute mitigating circumstances in an action for libel the facts, while not proving the truth of the charge, must be connected with or bear upon the defamatory charge, and must tend to disprove malice by showing that the charge was made in the honest belief that it was true, with some reason for such belief and without actual malice or evil design. *Mattice v. Wilcox*, 147 N. Y. 624.

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It is not a defense in mitigation of damages that defendant was told by another what he uttered against the plaintiff. *Inman v. Foster*, 8 Wend. 602; *Mapes v. Weeks*, 4 Wend. 659. But see cases under next subdivision.

In an action for libel in publishing an article stating that plaintiff and members of her family were insane, defendant is entitled to prove plaintiff's conduct, declarations, and letters to physicians at the hospital, where her relatives were confined, bearing on the question of actual sanity, though subsequent to publication in mitigation. *Lawson v. Morning Journal Assn.*, 32 App. Div. 71, 52 N. Y. Supp. 484.

A defendant may mitigate his damages, first by showing the general bad character of the plaintiff; second, by showing any circumstances which tend to disprove malice but do not tend to prove the truth of the charge. *Newell*, 882.

See also on Mitigation of Damages, cases, this article, under subdivision 5, "Malice," and subdivision 6, "Character."

## SUBDIVISION 5.

**Malice, Good Faith, Provocation.**

Where evidence introduced to show malice in the making of a privileged communication is such as to be equally consistent with the existence or nonexistence of malice, there is no question for the jury. *Haft v. First National Bank*, 19 App. Div. 423, 46 N. Y. Supp. 481. See also *Hemmens v. Nelson*, 36 St. Rep. 905, 13 N. Y. Supp. 175, affirmed 138 N. Y. 517; *Clemons v. Mellon*, 27 App. Div. 349, 49 N. Y. Supp. 1129.

Where the alleged libelous publication differed from the despatch received by defendant's agent, it was held error not to permit the agent, as defendant's witness, to explain the discrepancy, and to state his grounds for believing the publication to be true, as such testimony tended to show good faith and to prevent punitive damages. *Cameron v. Tribune Assn.*, 27 St. Rep. 907, 7 N. Y. Supp. 739.

Defendant, as witness in his own behalf, was properly asked with reference to an attempted libel, "Why did you write it?" since if he wrote the article with good motives, in the belief that it was true, it would go in mitigation of damages. *Bennett v. Smith*, 23 Hun, 50.

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In an action for the insertion of a libelous advertisement, evidence to show that defendant's manager had received similar advertisements and charged therefor higher than the ordinary rate, was held competent on the question of good faith. *Stafford v. Morning Journal Assn.*, 68 Hun, 467, 22 N. Y. Supp. 1008, affirmed 142 N. Y. 598.

Defendant may testify that before speaking alleged slanderous words, he had been informed the words spoken were true, and believed them to be true. *Calkins v. Colburn*, 10 St. Rep. 778, citing *Hatfield v. Lasher*, 81 N. Y. 246; *Willlover v. Hill*, 72 N. Y. 36; *Bennett v. Smith*, 23 Hun, 50.

The rule is laid down in *Frazier v. McCloskey*, 60 N. Y. 337, that evidence of repetition of the slander charged, or of the speaking of other slanderous words by defendant after the commencement of the action, is not admissible for the purpose of showing malice. That the plaintiff should not be permitted to show words which may be the subject of another action.

In *Turton v. N. Y. Recorder Co.*, 144 N. Y. 144 (150), citing authorities, it is said that the prevailing doctrine that the reiteration of the libel or slander after suit brought may be proved on the question of malice and damages are probably with this qualification, however, that the cause of action for the reiteration has been barred by the statutes of limitations, or that the language reiterated is for some other reason not actionable. Further stating that when such repetition has been excluded as evidence, it has always been upon the ground that it was an independent cause of action, and that if such evidence were received, there would be danger of a double recovery, citing numerous authorities, and stating that they are not harmonious.

This question was also considered in *Enos v. Enos*, 135 N. Y. 609.

Evidence that a libelous article was prepared by one of the defendant's reporters from information which he had received from another and which he made no attempt to verify, and that other articles were published after the plaintiff had protested against the first article and had declared in a letter written to the general manager of the defendant's newspaper that the contents of the first article were false, is sufficient to authorize a finding that the libelous articles were recklessly published.

Upon the trial the plaintiff may properly be permitted to tes-

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tify that the evidence submitted to him as a police magistrate by the complainant, referred to in the libelous articles, was insufficient to warrant the detention of the persons whom she accused.

Letters written by the plaintiff to the manager of the defendant's newspaper, in which he denounced the libelous articles as being false and demanded an apology from the publishers of the newspapers, are competent as indicating actual malice in the publications subsequently made.

The propriety of allowing the plaintiff to state what parts of one of the alleged libelous articles were true and what parts were untrue is doubtful, but the error, if any, involved in permitting him to do so is not such as will warrant the reversal of a judgment in his favor. *Crane v. Bennett*, 77 App. Div. 102, 79 N. Y. Supp. 166.

But evidence tending to show defendant's provocation, or that defendant was simply repeating the slander of others, was properly rejected unless connected with the defendant and limited to a time prior to the action. *Willlover v. Hill*, 72 N. Y. 36.

Evidence of a long series of provocation leading up to slanderous words is admissible. *Richardson v. Northrop*, 56 Barb. 105.

See, however, upon this point, with reference to previous provocation, *Maynard v. Beardsley*, 7 Wend. 560; *Gould v. Weed*, 12 Wend. 12.

Irritating language, addressed to a third person immediately previous to the utterance of the words complained of, cannot be given in mitigation. *Underhill v. Taylor*, 2 Barb. 348.

**SUBDIVISION 6.****Character.**

It is said in *Springstein v. Field*, Anth. N. P. 252, that plaintiff's bad character may be proved by defendant in mitigation of damages. Also so held in *King v. Root*, 4 Wend. 113, 7 Cow. 613. See *Hatfield v. Lasher*, 81 N. Y. 246 (250).

But proof of plaintiff's bad character subsequent to the speaking of the words is inadmissible. *Douglass v. Tousey*, 2 Wend. 352.

Evidence of plaintiff's general character is admissible in mitigation of damages. *Paddock v. Salisbury*, 2 Cow. 811.

Proof that plaintiff was generally suspected of having aided a

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certain person in escaping from jail is inadmissible. *Cole v. Perry*, 8 Cow. 214.

While a defendant cannot show, in mitigation of damages for a specific libel, other and disconnected immoralities on the part of the plaintiff, but can attack only the plaintiff's general character, yet where two charges in an alleged libelous publication relate to the same subject-matter and are not disconnected and independent, and the plaintiff submits only one of the charges to the jury, although the other charge was also counted on in the complaint and justified in the answer, the defendant may, under certain circumstances, give evidence in substantiation of such other charge, in mitigation of damages on the charge submitted to the jury. *Holmes v. Jones*, 147 N. Y. 59.

Proof of defendant's wealth is not competent to show the effect and weight which should be given to his utterances, nor upon the question of his credibility. *Palmer v. Haskins*, 28 Barb. 90; *Austin v. Bacon*, 49 Hun, 386; *Enos v. Enos*, 58 Hun, 45, 11 N. Y. Supp. 415.

Where the good character of plaintiff is put in issue by the answer, a witness may testify that he knows plaintiff's character to be good or he knows nothing to the contrary. *Graves v. Gilchrist*, 29 St. Rep. 638, 9 N. Y. Supp. 88.

Where plaintiff alleges in her complaint her good character and reputation, and this is put in issue by the answer, it is not error upon the trial, in the absence of a disclaimer by the defendant, to permit the plaintiff to introduce proof in support of that issue. *Stafford v. Morning Journal Assn.*, 142 N. Y. 598, affirming 68 Hun, 467, 22 N. Y. Supp. 1008, distinguishing *Hotailing v. Kilderhouse*, 1 N. Y. 530; *Pratt v. Andrews*, 4 N. Y. 493.

In an action for slander imputing unchastity to a woman, where the complaint avers the good character of plaintiff, and the answer denies it, she may give evidence of good reputation. *White v. Newcomb*, 25 App. Div. 397, 49 N. Y. Supp. 704, distinguishing *Gough v. St. John*, 16 Wend. 646, overruling *Ruan v. Perry*, 3 Cai. 120. See opinion Hardin, J., page 402, citing and discussing numerous authorities.

## SUBDIVISION 7.

## Miscellaneous — Res Gestæ.

Where the words are not actionable by themselves, but become so by reason of extrinsic facts, plaintiff must prove necessary facts.

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*Bullock v. Koon*, 4 Wend. 531, 9 Cow. 30; *Emery v. Miller*, 1 Den. 208; *Kinney v. Nash*, 3 N. Y. 177. Where it is held that where words spoken derive their actionable quality from facts and circumstances extrinsic to the words themselves, such facts and circumstances must be proved or plaintiff cannot recover.

Where the truth of the charge is pleaded, the justification must establish the substance of the charge justified, though it need not be identical in letter and form. The defendant, in order to prove a justification, must show that the entire charge imputed to the plaintiff is true, and the justification must be as broad as the charge. The burden of proving the truth of the charge is upon the defendant. *Miller v. Donovan*, 16 Misc. Rep. 453, 39 N. Y. Supp. 820.

In an action against a mercantile agency for slander in a report, the terms of the subscription, signed by the subscriber to whom such information was communicated, are competent to prove the relationship existing between him and the defendant, and the privileged character of the communication. *Ormsby v. Douglas*, 37 N. Y. 477.

On the question of the meaning of the words proved as understood at the time, all the conversation of the party at the time is admissible. *Coleman v. Pleystead*, 36 Barb. 26, appeal dismissed, 40 N. Y. 341.

Papers referred to in a libel may be admitted for the purpose of explanation and interpretation. *Nash v. Benedict*, 25 Wend. 645.

Where defendants had published a charge against plaintiff that she was a drunken woman, it was proper to allow plaintiff to testify to the transaction on the date particularly referred to in the article complained of, and to the circumstances leading up to the affair. *Tobin v. Sykes*, 71 Hun, 469, 24 N. Y. Supp. 943.

Where defendant admits uttering the alleged slanderous words, he and his witnesses should be permitted to testify to their version of the alleged slanderous conversation. *Judge v. Judge*, 14 Civ. Proc. 138.

In an action for slander, evidence of crime other than that charged by defendant is not admissible. *Haddock v. Naughton*, 74 Hun, 390, 26 N. Y. Supp. 455, distinguishing *Cary v. Hotailing*, 1 Hill, 311; *Hall v. Naylor*, 18 N. Y. 588.

Where the articles upon which the action was based charged plaintiff with having committed adultery in the State of New



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Jersey, proof of a New Jersey statute not pleaded in the complaint making adultery a crime, is not admissible. *Stuart v. N. Y. Herald Co.*, 73 App. Div. 459, 77 N. Y. Supp. 216.

The fact that defendant introduced in evidence a letter forming part of the correspondence, which had been first introduced by plaintiff, does not authorize him to cross-examine plaintiff as to such letter especially when its effect was to call out evidence which was utterly inadmissible and highly improper. *Palmer v. Matthews*, 162 N. Y. 100.

In an action against defendant for publishing an article stating that plaintiff had been arrested with a married woman at Coney Island, etc., it was error to permit plaintiff to show that thereafter a third party had accused him of being arrested at Coney Island with a prostitute, and that for the purpose of proving his statement such third person had produced and read the article in question. *O'Brien v. Bennett*, 72 App. Div. 367, 76 N. Y. Supp. 498.

An averment on the part of the plaintiff that he was innocent of the crime imputed to him does not enable defendant to show that no crime was imputed. *Harmon v. Carrington*, 8 Wend. 488.

In an action for libel the testimony of the person who read the libel as to the manner in which he understood it is inadmissible. *Van Vechten v. Hopkins*, 5 Johns. 211; *Maynard v. Beardsley*, 7 Cow. 500; s. c., 4 Wend. 336; *O'Brien v. Bennett*, 72 App. Div. 367, 76 N. Y. Supp. 498.

So in an action for slander the testimony of persons who heard the words, that they understood the defendant to refer to plaintiff, the language being ambiguous, is inadmissible. *Gibson v. Williams*, 4 Wend. 320; *Weed v. Bibbins*, 32 Barb. 315.

But evidence of visits of men in the night-time and of the receipt of letters of an insulting character were held admissible as showing the sense in which an unauthorized advertisement was read, though no special damage on account of these matters was alleged in the complaint. *Stafford v. Morning Journal Assn.*, 68 Hun, 467, 22 N. Y. Supp. 1008, affirmed 142 N. Y. 598.

In an action for stating plaintiff was a swindler, and had obtained credit by false representations, the truth of the statement being pleaded in justification and mitigation, evidence was proper that defendant's agent, to whom the representations were made, communicated them to defendant, and that he relied upon them. *Kimball v. Herald Co.*, 21 Week. Dig. 34.

Where the complaint alleged defendants published a newspaper

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in which alleged libelous article was published, the answer contained a general denial and alleged that the plaintiff and the owners — the publishers of the paper — entered into an agreement whereby the plaintiff released and discharged the owners and publishers from all causes of action on condition that the newspaper would publish a retraction of the libel, and that such retraction was accordingly published, it was held that as defendants deny that they published the newspaper, any agreement between the plaintiff and the persons who actually published the newspaper was not available to the defendant. *Potter v. Morning Journal Assn.*, 49 App. Div. 242, 63 N. Y. Supp. 223.

Actionable words, not specifically set out, cannot be proved. *Gray v. Nellis*, 6 How. 290.

In an action for libel, where it was charged that one clergyman made false statements as to another, a resolution of confidence adopted by the church after the publication of the libel is incompetent. *Putnam v. Press Publishing Co.*, 46 App. Div. 600, 62 N. Y. Supp. 110.

An affidavit in an action for libel, showing that plaintiff was innocent of the crime charged, that it was committed by another, received in evidence against objection that the affiant should have been produced in court, was improperly admitted. *Cudlip v. N. Y. Evening Journal Publishing Co.*, 174 N. Y. 158.

## ARTICLE XIII.

## PROCEDURE AND TRIAL.

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## SUBDIVISION 1.

## Arrest.

Where the right to an order of arrest depends on the nature of the action, the rule that the affidavits used must state not only what the cause of action is, but that it exists, is sufficiently com-

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plied with when they positively allege the utterance of the defamatory language in the presence of divers persons. Where the complaint in action for slander sets up several causes of action based upon several distinct slanders, an order of arrest may be granted, although the existence of but one of the causes of action is sufficiently shown. It seems that the question whether a complaint in such action should allege the defamatory words *in hæc verba* cannot be raised upon a motion to vacate an order of arrest. *Crandall v. Jacob*, 22 App. Div. 400, 48 N. Y. Supp. 279.

An order of arrest may be granted in libel irrespective of the defendant's residence; when the defendant resides within the jurisdiction of the court, the order may be granted without proof that he is about to depart. On motion to reduce the amount of bail, defendants should show the facts constituting defense or any mitigation. *Britton v. Richards*, 13 Abb. (N. S.) 258.

### SUBDIVISION 2.

#### Inspection of Books.

"In an action of libel brought against a corporation engaged in the business of preparing and distributing news matters to newspapers and news agencies, in which it appears that the books and records of the corporation with reference to the receipt, transmission, and dissemination of the alleged libels will be material evidence for the plaintiff on the trial, an inspection of such books and records will not be denied because it appears that it will enable the plaintiff to learn of publications of the alleged libel by third parties of whose identity he is now ignorant. The objection presented by an affidavit, submitted by the defendant's assignee for the benefit of creditors, in which the affiant denies that there are any books or records of the character mentioned by the plaintiff, is cured by limiting the operation of the order to such books and records of the character mentioned by the plaintiff as are in the possession or under the control of the defendant or the assignee." *Palmer v. United Press*, 67 App. Div. 64, 73 N. Y. Supp. 456.

### SUBDIVISION 3.

#### Striking out and Amending Pleading.

Facts pleaded in an answer in an action for libel not constituting total defense may be competent upon the question of malice,

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and will not be stricken out upon motion. *Morgan v. Bennett*, 44 App. Div. 323, 60 N. Y. Supp. 619.

Irrelevant allegations in an answer in an action for slander making charges of a criminal character against plaintiff, or statements prejudicial to his reputation, can be struck out on motion. It is no excuse for inserting them that they were alleged in mitigation of damages. *Hilton v. Carr*, 40 App. Div. 490, 58 N. Y. Supp. 134.

In an action against a newspaper for publishing evidence introduced in a divorce proceeding for adultery, an allegation in the answer that plaintiff had ill-treated his wife should be stricken out as scandalous and irrelevant. *Cruikshank v. Press Publishing Co.*, 32 Misc. Rep. 152, 65 N. Y. Supp. 678.

In *Fletcher v. Jones*, 64 Hun, 274, 19 N. Y. Supp. 47, it was held that the defense in an action for libel containing a general denial was not demurrable.

Defendant in an action for libel, after answering that the statements were true, should be allowed to file an amended answer pleading justification, but should not be allowed to deny in such amended answer that defendant published the newspaper in which the alleged libel was printed. *Canale v. Press Publishing Co.*, 61 App. Div. 143, 70 N. Y. Supp. 450.

**SUBDIVISION 4.****Trial, Charge, and Nonsuit.**

By the amendment made in 1898 to section 791 of the Code of Civil Procedure, an action in any court for libel or slander is a preferred cause.

Where, in an action for libel, based upon a newspaper publication, plaintiff's counsel refers to defendant's newspaper as containing pictures of a degrading character, and defendant's counsel remarked, "You point out one picture, one," whereupon plaintiff exhibits for the jury a copy of the newspaper which has been offered in evidence, and discusses the pictures which appear therein, the refusal of the court to allow defendant's counsel to withdraw a juror because of such discussion will not be disturbed upon appeal. *Howell v. Press Publishing Co.*, 48 App. Div. 318, 62 N. Y. Supp. 908.

Charge in an action for libel, where the publication is libelous *per se*, must be taken as a whole, and if the distinction between

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malice implied as matter of law, and actual malice, which the jury must find before they can award exemplary damages, is clearly pointed out, a verdict for the plaintiff will be sustained. *Van Ingen v. Star Co.*, 1 App. Div. 429, 37 N. Y. Supp. 114, affirmed 157 N. Y. 695.

*Richardson v. Van Nostrand*, 43 Hun, 299; *Crandall v. Barron*, 57 Hun, 259, 11 N. Y. Supp. 164, are cases in which it was held that the charge to the jury was equivalent to a direction to award vindictive damages, or was calculated to draw the minds of the jury aside from the proper rule in respect to damages.

In an action for libel in reporting a criminal case based upon the sending of the postal card calling the plaintiff a sucker, and stating that jail was a good place for him, where the report did not set forth the contents of the postal card, but stated that it accused plaintiff of being a scoundrel, it is error for the court to charge that the use of the word "scoundrel" was libelous and the article was not a true report and to refuse to submit that question to the jury. *Willmann v. Press Pub. Co.*, 49 App. Div. 35, 63 N. Y. Supp. 515.

It is error for the court to so charge as to lead the jury to infer that exemplary damages may be awarded, where there was no actual malice or reckless publication. *Prince v. Socialistic Co-operative Pub. Assn.*, 31 Misc. Rep. 234, 64 N. Y. Supp. 285.

But a charge is proper, that while there is no evidence of actual or express malice, a jury may award exemplary damages if they find that the article was published recklessly, carelessly, and wantonly. *McMahon v. N. Y. Publish. Co.*, 51 App. Div. 488, 64 N. Y. Supp. 713.

Where a newspaper without investigation publishes an account received by its reporter of a trial in which a clergyman was interested, concerning defamatory statements as to his language and conduct, it was held not to be error to refuse to charge that there was no evidence of actual malice and that exemplary or punitive damages could not be awarded. *Potter v. N. Y. Evening Journal Assn.*, 68 App. Div. 95, 74 N. Y. Supp. 317.

The defendant in his answer justified the language charged as libelous; the court instructed the jury in substance that if defendant failed to establish the justification, and if they found it was set up in bad faith they could take that into consideration in estimating the damages. *Held* no error; that if the jury concluded

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from the circumstances and nature of the charge made that the publication was malicious, in bad faith, or recklessly, carelessly, or wantonly made, they could go beyond compensation and award punitive damages. *Holmes v. Jones*, 121 N. Y. 461.

Where defendant introduced testimony in justification it was held not to be error to charge that if a jury found such defense was not sustained, they could consider the motives of defendant in setting up the defense, and if they concluded defendant did not act in good faith, this would afford ground for an increase of amount of exemplary damages. *Potter v. N. Y. Evening Journal Assn.*, 68 App. Div. 95, 74 N. Y. Supp. 317.

## SUBDIVISION 5.

## When Question for Court — When for Jury.

Where the words published are of doubtful significance and capable of being regarded as either libelous or innocent, it is for the jury to say in which sense the language was used. *Gallagher v. Bryant*, 44 App. Div. 527, 60 N. Y. Supp. 844, affirmed 162 N. Y. 662, cited in *D'Andrea v. New York Press Co.*, 61 App. Div. 608, 70 N. Y. Supp. 759.

In a civil action for libel where the publication is admitted and the words are unambiguous and admit of but one sense, the question of libel or no libel is one of law for the court. *Hunt v. Bennett*, 19 N. Y. 173; *Moore v. Francis*, 121 N. Y. 99; *Turton v. N. Y. Recorder Co.*, 144 N. Y. 144.

Where the facts upon which defendant bases claim of privilege are challenged by the plaintiff, it becomes the duty of the court to submit to the determination of the jury whether the facts exist upon which the privilege was sought to be founded. *Warner v. P. P. Co.*, 132 N. Y. 181, citing *Lovell v. Houghton*, 116 N. Y. 525.

In an action for libel it is for the court to determine whether the alleged libel was a privileged communication, but the questions of good faith, belief in the truth of the statement, and the existence of actual malice remain for the jury.

The rule is the same where the alleged libelous charge is made against a public officer as such. *Hamilton v. Eno*, 81 N. Y. 116.

Whether matter is privileged, is a question of law. *Sickles v. Kling*, 60 App. Div. 515, 69 N. Y. Supp. 944.

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In *Cornish v. Bennett* 38 Misc. Rep. 688, 78 N. Y. Supp. 244, it was held that, where the article was ambiguous, the complaint was not demurrable. Question whether the article was defamatory being for the jury.

Whether the words spoken are actionable *per se* is a question for the court, but the meaning of the words and whether they were intended to be slanderous is for the jury. *Woodruff v. Woodruff*, 36 Misc. Rep. 15, 72 N. Y. Supp. 39.

Where the matter contained in a publication is unambiguous and admits of but one sense, the question of libel or no libel is one of law to be decided by court. *Beecher v. Press Publish. Co.*, 60 App. Div. 536, 69 N. Y. Supp. 895.

Whether an alleged defamatory article concerning a clergyman would have a tendency to deprive him of his office, or show him to be unfit to continue therein, is a question where it rests on a construction of the article, which is to be determined by the court. *Potter v. N. Y. Evening Journal Assn.*, 68 App. Div. 95, 74 N. Y. Supp. 317.

Question of good faith, belief in the truth of the statement, and the existence of actual malice rest with the jury though the court hold a communication *prima facie* privileged. *Payne v. Rouss*, 46 App. Div. 315, 61 N. Y. Supp. 705.

Where, in an action for slander, words proven on the trial to have been uttered by defendant are ambiguous, and in the connection in which they were uttered capable of construction imputing crime to plaintiff, and they might have been so understood, a question of fact is presented for the jury as to whether the defendant intended to charge the plaintiff with such crime. *Warner v. Southall*, 165 N. Y. 496, affirming 31 App. Div. 375, 52 N. Y. Supp. 320, citing and following *Hayes v. Ball*, 72 N. Y. 418.

Where the evidence is conflicting as to ownership of a newspaper containing the alleged libel, question of ownership is for the jury; and where the article did not name plaintiff, question as to whether he was the person intended is for the jury to pass upon. *Stokes v. Morning Journal Assn.*, 66 App. Div. 569, 73 N. Y. Supp. 245; s. c., 72 App. Div. 184.

A mere conjecture or suspicion that defendant communicated slanderous statements to another for the purpose of publication is not sufficient to authorize a submission of that question to the jury. *Schoepflin v. Coffey*, 162 N. Y. 12.

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If the language of the article is plain and unambiguous it is the duty of the court to determine whether or not it is libelous. If it is ambiguous and of such a character as to lead a person of ordinary intelligence to infer that a certain charge was made, though not in plain words, the court may submit the question to the jury, provided there be a proper innuendo in the complaint. *Kuster v. Press Publishing Co.*, 80 App. Div. 615, 80 N. Y. Supp. 1050, citing *Moore v. Francis*, 121 N. Y. 199; *Beecher v. Press Publishing Co.*, 60 App. Div. 536, 69 N. Y. Supp. 895.

It is the province and duty of the court where an article is free from ambiguity to charge whether or not it is libelous. *Willman v. Press Publishing Co.*, 49 App. Div. 37, 63 N. Y. Supp. 515, citing *Townshend*, § 286; *Woodruff v. Bradstreet Co.*, 116 N. Y. 217; *Hunt v. Bennett*, 19 N. Y. 173.

If the application or meaning of words in an alleged libel is ambiguous, or the sense in which they were used is uncertain, and they are capable of a construction which would make them actionable, although at the same time an innocent sense can be attributed to them, it is for the jury to determine, upon all the circumstances, whether they were applied to the plaintiff, and in what sense they were used. *Sanderson v. Caldwell*, 45 N. Y. 398.

It is a question for the jury to determine whether the publication referred to the plaintiff and caused him injury. While, no doubt, an action for libel may be maintained where the plaintiff is described in the libelous matter, directly or indirectly, without his name, and is pointed out so that it is capable of direct proof that he was intended; yet where the allegations negative such a conclusion and show to the contrary, this rule has no application. There is no principle which authorizes the introduction of any such evidence where, on the face of the complaint, it is clearly apparent that the libelous words do not relate to, and have no connection with, the plaintiff or his business as stated therein. *Fleischman v. Bennett*, 87 N. Y. 231 (237).

Where words are capable of two interpretations it is for the jury to determine in what sense they were intended. *Gibson v. Williams*, 4 Wend. 320; *Barnard v. Press Publishing Co.*, 43 St. Rep. 507, 17 N. Y. Supp. 573; *Mattice v. Wilcox*, 147 N. Y. 624; *Garby v. Bennett*, 40 App. Div. 163, 57 N. Y. Supp. 853, affirmed 166 N. Y. 392; *Hays v. Ball*, 72 N. Y. 418.

Where the facts upon which defendant bases a claim of privilege



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are challenged by the plaintiff, it becomes the duty of the court to submit to the jury the question whether the facts exist upon which the privilege is sought to be founded. *Lovell Co. v. Houghton*, 116 N. Y. 526; *Warner v. Press Publishing Co.*, 132 N. Y. 182.

## SUBDIVISION 6.

## New Trials and Appeals.

A verdict for defendant in libel will not be set aside upon the weight of evidence where the jury has found the substantial truth of the charge made. *Engel v. N. Y. Evening Post Co.*, 38 Misc. Rep. 377, 77 N. Y. Supp. 884.

To authorize a new trial in actions for libel or slander, the amount of the verdict must be so large as to be clearly unjust and make it apparent that the verdict was the result of passion, or some influence other than that of law and the evidence. *Potter v. Thompson*, 22 Barb. 87; *Root v. King*, 7 Cow. 613, 4 Wend. 113; *Ryckman v. Parkins*, 9 Wend. 470; *Tillotson v. Cheetham*, 2 Johns. 63.

In *Smith v. Matthews*, 21 Misc. Rep. 150, 47 N. Y. Supp. 96, a new trial was granted upon newly-discovered evidence.

In *Remsen v. Bryant*, 36 App. Div. 240, 56 N. Y. Supp. 728, the court refused to set aside a verdict of six cents as inadequate.

In an action for libel where a court erroneously charged that the interpretation of the language is doubtful, and it should have charged the publication to be a libel as a matter of law, and a verdict was rendered for plaintiff for \$250, a new trial was granted plaintiff, since the court could not say that the jury would not have given a greater amount but for the error in the charge. *Jesper v. Press Publish. Co.*, 76 Hun, 64, 27 N. Y. Supp. 619, affirmed 149 N. Y. 612.

In an action for libel where the only question presented was one of costs and a verdict was against the evidence, new trial was refused where the verdict was for defendant instead of being for nominal damages for plaintiff. *Funk v. Evening Post Publish. Co.*, 76 Hun, 497, 27 N. Y. Supp. 1089, affirmed 152 N. Y. 619.

In an action for publishing that plaintiff had been arrested on a charge of forgery, where plaintiff testified he had never been arrested, a new trial was refused on the ground of newly-discovered evidence that he had been arrested on an action for conversion that had been voluntarily discontinued. *Alliger v. The Mail*

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*Printing Assn.*, 47 St. Rep. 205, 19 N. Y. Supp. 584, 65 Hun, 619, 19 N. Y. Supp. 584.

In an action for libel in charging a married woman with elopement, a new trial was granted upon the ground of newly-discovered evidence. *Smith v. Matthews*, 21 Misc. Rep. 150, 47 N. Y. Supp. 96.

The same case is reported 152 N. Y. 152, reversing 9 Misc. Rep. 427, which in turn reversed 6 Misc. Rep. 162.

An actual impairment of character is the true basis for damages, and where the charge did not injure the character, the verdict was set aside as against public policy. *O'Connor v. Press Publishing Co.*, 34 Misc. Rep. 564, 70 N. Y. Supp. 367.

The amount to be awarded in an action for libel rests in the discretion of the jury, and unless such power has been unwisely or improperly exercised, the verdict will not be disturbed. *Schoepfin v. Coffey*, 25 App. Div. 438, 49 N. Y. Supp. 627, reversed 162 N. Y. 12.

In *White v. Newcomb*, 25 App. Div. 397, 49 N. Y. Supp. 704, a verdict was set aside as excessive.

In *Davey v. Davey*, 22 Misc. Rep. 668, 50 N. Y. Supp. 161, the verdict was reduced, citing *Potter v. Thompson*, 22 Barb. 87; *Sears v. Conover*, 4 Abb. Ct. App. Dec. 179; *Diblin v. Murphy*, 3 Sandf. 19; *Collins v. Albany & S. R. R. Co.*, 12 Barb. 492; *Clapp v. Hudson R. R. Co.*, 19 Barb. 461.

As in all actions for tort the court exercises the right to set aside or reduce verdicts as excessive or inadequate, although it seems that courts are less inclined to exercise the power to reduce verdicts in actions of this character than in other actions for tort, it is held that such damages are peculiarly within the province of the jury, and that the court will not interfere with the amount unless it appears that the jury was influenced by passion or prejudiced to award an excessive amount. *Jacquelin v. Morning Journal Assn.*, 39 App. Div. 515 (520), 57 N. Y. Supp. 299; *Palmer v. N. Y. News Publishing Co.*, 31 App. Div. 210, 52 N. Y. Supp. 539, reversed 162 N. Y. 103.

In *Scott v. Sun Printing & Publish. Co.*, 74 Hun, 284, 26 N. Y. Supp. 690, it was held that in an action for libel the judgment of the jury and not of the court must fix the amount of recovery, subject only to the qualification that when the damages found are flagrantly outrageous and extravagant, so as to evince intemperate

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passion, partiality, or corruption on the part of the jury, the court may interfere, by setting aside the verdict, or by directing plaintiff to take a less sum as a condition of retaining the recovery, but while the policy of reducing the verdict, instead of setting it aside, may be questionable, the power of the court to do so is well established.

**SUBDIVISION 7.****Costs.**

Under the provisions of section 3228, subdivision 3, in an action to recover damages for libel or slander, if the plaintiff recovers less than \$50 damages, the amount of his costs cannot exceed the damages.

An action to recover damages for alienating the affections of plaintiff's husband by a slanderous report is for personal injury not triable before justice of the peace, and, therefore, when the recovery is less than \$50, the costs should not exceed the amount of the recovery. *Wilson v. McGregor*, 20 Civ. Proc. 36, 34 St. Rep. 775, 12 N. Y. Supp. 39, referring to section 3343, subdivision 9, of the Code, defining libel and slander as a personal injury.

**ARTICLE XIV.****\*DAMAGES.**

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**SUBDIVISION 1.****Special Damage — When Damage Presumed.**

In order to maintain an action for slander where the words are not actionable *per se*, the plaintiff must show some definite temporal loss. *Fraser*, 21, citing *Davies v. Solomon*, L. R., 7 Q. B. 112, where it was held that a dinner at a friend's house was of some temporal value. For every libel an action for damages will lie though no special damage can be proved in this respect; there is a wide difference between libel and slander. *Fraser*, 19, citing

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\*For further consideration of damages, see Art. II, under Special Damages; Art. XI, Pleading; and Art. XII, Evidence, relative to damages.

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*Radcliffe v. Evans* (1892), 2 Q. B. at p. 529; same rule, *Newell*, 867.

Language must be either (1) such as necessarily, in fact, or by a presumption of evidence, occasions damage to him whom or whose affairs it is concerning, or (2) such as does not necessarily, or as a necessary consequence, but does by a natural and proximate consequence, occasion damage to him whom or whose affairs it is concerning.

Language of the first of these classes is commonly termed libelous *per se*, or actionable *per se*, because its publication confers a *prima facie* right of action, and is *prima facie* a wrong without any evidence of damage other than that which is implied or presumed from the fact of publication.

The publication of language of the second of these classes does not, *per se*, confer a *prima facie* right of action, and is not, *per se*, a *prima facie* wrong. It confers a right of action only in those cases in which, as a natural and proximate consequence of the publication, loss (special damage) has in fact ensued to him whom or whose affairs the language was concerning. *Townshend on Slander and Libel*, p. 203.

Words if published without lawful occasion are actionable, if it be proved by evidence of special damage not too remote that they have in fact injured the plaintiff's reputation. *Odgers*, 89; 18 *Am. & Eng. Encyc. of Law*, 1085.

Certain publications are said to be actionable *per se*. By this is meant that an action will lie for making them without proof of actual injury, because their necessary or natural and proximate consequences would be to cause injury to the person of whom they are spoken, and, therefore, injury is to be presumed. In the case of certain other publications no such presumption can be made, because observation does not justify a like conclusion. Therefore, in such cases, the publications are only actionable on averment and proof that injury which the law can notice actually followed as a natural and proximate consequence. *Cooley on Torts*, p. 196.

Special damages are such as the law will not infer from the nature of the words themselves, but such damages must be specially claimed in the pleadings, and evidence relative thereto must be given at the time. When on their face the words used by the defense clearly must have injured the plaintiff's reputation they are said to be actionable in themselves, and the plaintiff may

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recover a verdict for a substantial amount without giving evidence of actual pecuniary loss. But where they are not such words as the law presumes to be necessarily prejudicial to a person, evidence must be given to show that some appreciable injury has followed from their use. There is no presumption in his favor. But such words, though not actionable in themselves if they occasion the party direct injury, become actionable upon proof of such fact being made. Newell, 849, citing Cooke on Defamation, 22; Odgers, 89; *Fry v. Bennett*, 2 Duer, 247; *Tobias v. Harland*, 4 Wend. 537.

Certain words, all admit, are in themselves actionable, because the natural consequence of what they impute to the party is damage, as if they import a charge that the party has been guilty of a criminal offense involving moral turpitude, or that the party is infected with a contagious distemper, or if they are prejudicial in a pecuniary sense to a person in office or to a person engaged for a livelihood in a profession or trade; but in all other cases the party who brings an action for words must show the damage he or she has suffered by the false speaking of the other party.

Where the words are intrinsically actionable, the inference or presumption of law is that the false speaking occasions loss to the plaintiff, and it is not necessary for the plaintiff to aver that the words alleged amount to the charging of the described offense, for their actionable quality is a question of law, and not of fact, and will be collected by the court from the words alleged and proved, if they warrant such a conclusion. *Pollard v. Lyon*, 91 U. S. 225 (227).

By special damage is meant such as the law will not infer from the nature of the act, but must be alleged in the pleading and proved at the trial. Pollock, 290, citing *Tobias v. Harland*, 4 Wend. 539.

When the words are not actionable *per se* it is necessary to prove special damage has been caused by speaking the words. *Keenholts v. Becker*, 3 Den. 346 (350).

When the words charged are not actionable in themselves, the plaintiff must allege and prove that by reason of the slander he has sustained some pecuniary damage. It is not enough that he has suffered pain of mind, lost the society or good opinion of his neighbors, or the like, unless he has also been injured in his estate or property. It is enough, however, that the slander has prevented

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the party from receiving something of value which would otherwise have been conferred, though gratuitously. *Beach v. Ranney*, 2 Hill, 312, citing *Vicars v. Wilcocks*, 8 East, 1.

The authorities in England are numerous upon this point. It was held not to be slanderous *per se*, and to require proof of special damages to maintain an action where one was called a rogue or swindler. *Ward v. Weeks*, 7 Bing. 211; *Hopwood v. Thorn*, 8 C. B. 293.

So as to the words "A rogue, a villain, and a varlet," *Stanhope v. Blith*, 4 Rep. 15; "a cheat," *Savage v. Robery*, 2 Salk. 694; *Lucas v. Flynn*, 35 Iowa, 9.

In the courts in this country it is not actionable to call a person a liar, *Kimmio v. Styles*, 44 Vt. 351; or a rogue, *Artieta v. Artieta*, 15 La. Ann. 48.

The court in *Terwilliger v. Wands*, 17 N. Y. 54 (60), lays down a rule as to what constitutes special damages as follows: Opinion Strong, J., says: "Starkie mentions the loss of a marriage; loss of hospitable gratuitous entertainment; preventing a servant or bailiff from getting a place; the loss of customers by tradesman; and says that in general whenever a person is prevented by slander from receiving that which would otherwise be conferred upon him, though gratuitously, it is sufficient. (1 Starkie on Slander, 195, 202; Cooke's Law of Defamation, 22-24.) In *Olmsted v. Miller*, 1 Wend. 506, it was held that the refusal of civil entertainment at a public house was sufficient special damage. So in *Williams v. Hill*, 19 Wend. 305, was the fact that the plaintiff was turned away from the house of her uncle and charged not to return until she had cleared up her character. So in *Beach v. Ranney*, was the circumstance that persons, who had been in the habit of doing so, refused longer to provide fuel, clothing, etc. (2 Starkie on Evidence, 872, 873.) These instances are sufficient to illustrate the kind of special damage that must result from defamatory words not otherwise actionable to make them so; they are damage produced by, or through, impairing the reputation."

The words thus constituting the alleged defamatory matter must be set out in the complaint. *Germ-Proof Filter Co. v. Pasteur Co.*, 81 Hun, 49, 30 N. Y. Supp. 584.

If the words are defamatory *per se* the damage is presumed and need not be alleged; but if special damage is of the gist of the

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action, plaintiff must allege it in the complaint. *Caldwell v. Raymond*, 2 Abb. Pr. 193; *Roberts v. Breckon*, 31 App. Div. 431, 52 N. Y. Supp. 638. The latter case cites Sedgwick on Damages, §§ 443, 1261; Abbott's Trial Evidence, 669; *Backus v. Richardson*, 5 Johns. 476, 485; *Tobias v. Harland*, 4 Wend. 537; *Hallock v. Miller*, 2 Barb. 630; *Solms v. Lias*, 16 Abb. Pr. 311; *Hallock v. Belcher*, 42 Barb. 199.

Special damage cannot be shown unless pleaded. *Le Massena v. Storm*, 62 App. Div. 150, 70 N. Y. Supp. 882, citing *Bosi v. N. Y. Herald Co.*, 58 App. Div. 619, 68 N. Y. Supp. 1134; *Langdon v. Shearer*, 43 App. Div. 607, 60 N. Y. Supp. 193; *Kraft v. Rice*, 45 App. Div. 569, 61 N. Y. Supp. 368.

Special damages to sustain an action of slander must be the natural and immediate consequence of the words spoken. *Anonymous*, 60 N. Y. 262, citing *Terwilliger v. Wands*, 17 N. Y. 54.

Such special damage must be averred in the complaint and proved upon the trial. *Langdon v. Shearer*, 43 App. Div. 607, 60 N. Y. Supp. 193.

Where the loss of business claimed as the result of the slander had not been specially alleged,—*Held*, plaintiff was not entitled to recover therefor. *Le Massena v. Storm*, 62 App. Div. 153, 70 N. Y. Supp. 882.

The latter case also cites authorities to the proposition that special damage can only be recovered where it was the necessary or natural and proximate consequence of the defamatory words.

*Anonymous*, 60 N. Y. 262, in laying down the same rule, holds that the action cannot be maintained where the party to whom the slander was communicated, and by reason of whose action special damage was claimed, wholly disbelieved the truth of the statement.

The complaint in an action of slander, where the words charged are not actionable *per se*, must allege special damage. A general allegation that the slanderous charge injured the plaintiff in her good name and caused her relatives and friends to slight and shun her is insufficient. *Bassell v. Elmore*, 48 N. Y. 561.

When words charged as libelous are not actionable in themselves plaintiff must prove that by reason of the libelous matter he has sustained pecuniary damage. *Bell v. Sun Printing & Publishing Co.*, 3 Abb. N. C. 157.

Under a single count in an action of slander, plaintiff may prove a repetition of the same slanderous charge, for the purpose

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of showing the degree of malice and thus enhancing the damage. So also, when the words charged are not actionable *per se*, but the plaintiff has alleged and proven special damage, she may show a repetition of the charge, although not spoken in the presence or brought to the knowledge of the one through whose action plaintiff sustained the special damage. *Bassell v. Elmore*, 48 N. Y. 561.

It is held in *Terwilliger v. Wands*, 17 N. Y. 34; *Wilson v. Goit*, 17 N. Y. 443, that special damage to support an action for defamatory words, not actionable in themselves, must result from injury to the plaintiff's reputation which affects the conduct of others toward him, and that mental distress, physical illness, and inability to labor occasioned by the aspersion are not such natural and legal consequences of the words spoken as to give an action; and that the loss of wife's services through illness, the consequence of mental depression resulting from defamatory words, not actionable in themselves, will not support an action by the husband.

The former case overrules *Bradt v. Towsley*, 13 Wend. 253; *Fuller v. Fenner*, 16 Barb. 333.

Illustrations of what facts are sufficient to constitute proof of special damage: In case of unmarried women, as the law stood previous to 1871, will be found, *Moody v. Baker*, 5 Cow. 413; *Olmstead v. Miller*, 1 Wend. 506; *Williams v. Hill*, 19 Wend. 305; *Beach v. Ranney*, 2 Hill, 309.

It was held in *Sewell v. Catlin*, 3 Wend. 291; *Hastings v. Palmer*, 20 Wend. 225; *Hallock v. Miller*, 2 Barb. 630; *Olmstead v. Brown*, 12 Barb. 657, that it is not sufficient proof of special damage to authorize a recovery that a third person withheld business from plaintiff in consequence of the report of his failure, unless such report is shown to have been given out by defendant.

## SUBDIVISION 2.

## Compensatory Damage.

In an action for libel there are two kinds of damages which the plaintiff may recover. The first is compensatory damages, which means reparation for the actual injury the plaintiff has suffered because of the defamation; and, secondly, exemplary or punitive damages; that is, damages over and above such sums as will compensate him for his actual loss. From a libel the law presumes injury, but it is for the jury to measure the extent of



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the injury and to award a commensurate amount of compensation. *Miller v. Donovan*, 16 Misc. Rep. 453, 39 N. Y. Supp. 820.

The damages recoverable in actions for torts or wrongs have long since been classified into compensatory and punitive or exemplary. Compensatory damages are not recoverable, except upon proof of certain facts, and punitive damages were not recoverable without proof of facts additional to the facts required to recover compensatory damages. *Reid v. Terwilliger*, 116 N. Y. 530 (534).

The amount of damages in an action for libel is peculiarly within the province of the jury; they may give nominal damages, or damages to a greater or less amount as they shall determine; they may award damages which are merely compensatory, or damages beyond mere compensation, called punitive or vindictive damages, by way of example or punishment, when in their judgment the defendant was incited by actual malice or acted wantonly or recklessly in making the defamatory charge. *Holmes v. Jones*, 147 N. Y. 59.

Substantial damages are awarded where the jury endeavor to arrive at a figure which will fairly compensate the plaintiff for the injury he has sustained. *Newell*, 841.

### SUBDIVISION 3.

#### **Punitive Damage; Aggravation and Mitigation.**

Vindictive, punitive, or exemplary damages are awarded by a jury to signify their sense of defendant's conduct by fining him to a certain extent, punishing him by awarding smart money or damages in excess of the amount which would be adequate compensation for the injury inflicted on plaintiff's reputation. *Newell*, 842.

Whatever tends to prove malice in defamation aggravates the wrong and entitles plaintiff to exemplary damages. Whatever negatives malice operates to mitigate damages. The jury determines whether given matter is in mitigation or aggravation of damages. *Hale on Damages*, 110.

It has been repeatedly held in this State that a libel recklessly or wantonly published, as well as one induced by personal ill-will, will support an award of punitive damages. *Warner v. Press Publishing Co.*, 132 N. Y. 181 (185); *Holmes v. Jones*, 121 N. Y. 461 (467); *Holmes v. Jones*, 147 N. Y. 59 (67).

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An instruction to the jury in an action for libel that punitive damages cannot be awarded unless defendants were moved by actual malice, but that the jury may find actual malice if defendants fail to make any investigation as to the truthfulness of the charge, will not warrant the reversal of a judgment for the plaintiff where the entire charge was most favorable to defendants, and disclosed repeated statements that there was no actual malice on the part of the defendants, and that if they were to be held liable it was by reason of implied malice for a reckless and negligent publication of the libel.

Punitive damages for libel are not limited to cases of actual malice, but may be awarded for a libel recklessly or carelessly published, as well as one induced by personal ill-will. *Smith v. Matthews*, 152 N. Y. 152.

To authorize the imposition of exemplary damages, there must be not only constructive malice, but malice in fact; that is, an actual evil motive, or its equivalent, on the part of the defendant. *Miller v. Donovan*, 16 Misc. Rep. 453, 39 N. Y. Supp. 820.

In an action for libel, proof of express malice on the part of the defendant, in the particular publication counted upon, is competent for the purpose of enhancing the damages, whether the publication comes within the class of privileged communications, or not.

Within the rule which allows proof of the repetition of the libelous charge, to show malice beyond that implied by the original publication, any act or language of the defendant tending to prove malice on his part, in regard to the particular libel which is the subject of the action, may be proved.

Testimony tending to show that the publications complained of were the result of a malicious feeling entertained by the defendant toward the plaintiff, and that the libelous articles were published to gratify this malicious feeling, and to accomplish the defendant's threatened purpose "to finish" the plaintiff, is of this nature, and, therefore, admissible.

In an action for the publication of a libel, in a newspaper, it is competent for the plaintiff to prove the extent of the circulation of the paper, at the time the libel was published. *Fry v. Bennett*, 28 N. Y. 324.

Punitive damages cannot be recovered for general malice, but only for malice which existed at the time of the libel and had some

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influence in causing its commission. *Krug v. Pitass*, 162 N. Y. 154.

In *Marx v. P. P. Co.*, 134 N. Y. 561, citing *Cruikshank v. Gordon*, 118 N. Y. 178, and *Distin v. Rose*, 69 N. Y. 123, where no request was made to instruct the jury to consider as a fact that the justification was pleaded in good faith, not wantonly, the court could not hold as a matter of law that the answer could not be considered to enhance damages.

The failure of defendant in an action of libel to establish the defense set up in the answer that the article published by it was true, does not authorize the jury to award exemplary damages against it, unless they find that such defense was pleaded carelessly, recklessly, or wantonly, or in bad faith, or with a desire to further injure the plaintiff. *Willard v. Press Publish. Co.*, 52 App. Div. 448, 65 N. Y. Supp. 73, collating and discussing the authorities on this point.

In an action of libel, brought by a police magistrate in the city of New York, against the proprietor of a newspaper, which published, under circumstances authorizing an award of exemplary damages, articles falsely charging the magistrate with having been guilty of conduct in the exercise of his judicial duties which tended to degrade him in the public estimation and to hold him up to the contempt and scorn of the community as a hectoring, bullying, insulting magistrate who refused to give heed to a complainant who appeared before him and charged certain persons with the commission of outrageous crimes, a verdict of \$40,000 was held excessive and reduced to \$25,000. *Crane v. Bennett*, 77 App. Div. 102, 79 N. Y. Supp. 66.

Evidence that the articles in question appeared in the defendant's newspaper while he was absent from the United States, and that, before going abroad, he left with the editors, subeditors and other employees of the newspaper a notice that it was an imperative rule that nothing reflecting upon the reputation of any person should be published in the newspaper until the truth of the same had been ascertained after strict investigation, will not prevent an award of exemplary damages.

The power to award exemplary damages in an action for libel is not restricted to cases where the publication was induced by actual malice, but extends to cases where the libel was recklessly

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or carelessly published. *Crane v. Bennett*, 77 App. Div. 102, 79 N. Y. Supp. 66.

For fuller consideration of this question see "Malice," "Pleading," "Evidence," relative to damages.

### ARTICLE XV.

#### SLANDER OF TITLE.— LIBEL ON BUSINESS.

Bigelow on Torts, p. 87, says that the only real connection an action for slander of title has with actions for slander is in the name the action bears and in the plaintiff's pleading.

It is incumbent upon the plaintiff, in order to maintain an action for slander of property or of title, to prove (1) The words must be false; (2) they must be maliciously published; (3) they must result in a pecuniary loss or injury to the plaintiff. Newell, 204.

There must be malice, either express or implied, to maintain an action for slander of title. *Hargrove v. Le Breton*, 4 Burr. 2422 (1769), Eng. ruling cases, vol. 9, p. 168; *Smith v. Spooner*, 3 Taunt. 246 (1810), ruling cases, vol. 9, p. 173.

A person may be as seriously injured by misrepresentation of his property as by the slander of himself in respect to his business, and indeed the two often go together. But there may be misrepresentation in respect to particular property not connected with one's business and where the injury will concern the property alone. Such misrepresentation is actionable, provided it is malicious and damaging, but malice will not be presumed and damage must be alleged and proved. *Cooley*, 260, citing *Gott v. Pulsifer*, 122 Mass. 235; s. c., 23 Am. Rep. 322.

To support the action it must be shown that false words maliciously spoken were followed as a legal consequence by pecuniary damage to plaintiff, and these facts must be specially alleged and substantially proven. *Bailey v. Dean*, 5 Barb. 297; *Kendall v. Stone*, 5 N. Y. 14; *Childs v. Tuttle*, 48 Hun, 228.

An action for slander of title depends for success upon two elements; namely, falsity and malice. *Hastings v. Giles Lithographic Co.*, 51 Hun, 364 (369), 4 N. Y. Supp. 319, citing *Kendall v. Stone*, 5 N. Y. 14 (18); *Hovey v. Rubber Tip Pencil Co.*, 57 N. Y. 119.

It is said in *Hovey v. Rubber Tip Pencil Co.*, 57 N. Y.

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119, that to maintain an action for a libel injurious to plaintiff's business, it must be shown that not only defendant's publication was not justified in fact, but that it was with malice or a willful purpose of inflicting injury. Distinguishing *Snow v. Judson*, 38 Barb. 210.

This seems, however, to be true only in cases where the publication is in fact a privileged communication. *Lowell Co. v. Houghton et al.*, 116 N. Y. 520 (525), citing *Klinck v. Colby*, 46 N. Y. 427.

This subject is considered and the authorities collated and discussed in *Le Massena v. Storm*, 62 App. Div. 150, 70 N. Y. Supp. 882, where it is said: "When the slander is of a property right or title, or of a thing, falsity of utterance, malice, and special damages flowing or resulting necessarily or naturally as the proximate consequence must be alleged and shown by the plaintiff, except in those cases where the slanderous words also impute to the owner dishonesty, fraud, deception, or other misconduct in his trade or business in connection with the property. (Odgers on Libel and Slander [3d ed.], 30, 73, 88, 156; Newell on Slander and Libel [2d ed.], 203, 204, 208, 217; Townshend on Slander and Libel [4th ed.], §§ 205, 206; *Kendall v. Stone*, 5 N. Y. 14; *Like v. McKinstry*, 41 Barb. 186; *Evans v. Harlow*, 5 Q. B. 624; *Young v. Macrae*, 3 B. & S. 264; *Wilson v. Du Bois*, 35 Minn. 471.)"

The following citation from Odgers (3d ed.), p. 30, is quoted as laying down the true rule.

"Sometimes, also, an attack upon a thing may be defamatory of the owner of that thing or of others immediately connected with it. But this is only so where an attack upon the thing is also an indirect attack upon the individual. If the words do not touch the personal character or professional conduct of the individual they are not defamatory of him and no action lies (unless the words fall within the rules relating to slander of title). But to impute that the goods which the plaintiff sells or manufactures are adulterated to his knowledge is a distinct charge against the plaintiff of fraud and dishonesty in his trade." Again, the learned author says (p. 73): "But it is not the law that any words spoken to the disparagement of an officer, professional man, or trader will, *ipso facto*, be actionable *per se*. Words to be actionable on this ground 'must touch the plaintiff in his office, profession, or trade;'

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that is, they must be shown to have been spoken of the plaintiff in relation thereto and to be such as would prejudice him therein. They must impeach either his skill or knowledge or attack his conduct therein."

*Tobias v. Harland*, 4 Wend. 537, and *Kennedy v. Press Publishing Co.*, 41 Hun, 422; *Bosi v. New York Herald Co.*, 33 Misc. Rep. 622, 68 N. Y. Supp. 898, are cited to the same principle, the latter case laying down the rule to be that the plaintiff has no action where the libel is on his place of business and not of himself, unless he alleges and proves that he has sustained special damage as a necessary consequence of the publication.

This citation of authority is followed by a discussion of the necessity for alleging special damage to an individual in such case.

The rule in *Tobias v. Harland*, 4 Wend. 537, is cited with approval in *Marlin Fire Arms Co. v. Shields*, 171 N. Y. 384, which was an action brought to restrain criticisms of a manufactured article published in a magazine; in discussing the doctrine that equity will not interfere in such case, authorities above cited were referred to, and in addition thereto *Dooling v. Budget Publish. Co.*, 144 Mass. 258, where it was held that "words relating merely to the quality of the articles made, produced, furnished, or sold by a person, if false and malicious, are not actionable without special damage.

A publication charging that a certain house is a bawdy-house refers to the character of the occupants and is not merely a libel on the house, and one of its occupants may maintain an action for libel. *McLean v. N. Y. Press Co.*, 46 St. Rep. 706, 19 N. Y. Supp. 262.

A complaint alleging the publication of an article stating that the police raided a house occupied by the plaintiff, that persons in it were guilty of gambling, and that the persons seeking the information were ushered into the room where the gambling occurred, is not demurrable as a libel of the house and not of the plaintiff, as it may be inferred that the gambling was conducted with the knowledge of plaintiff. *Dexter v. Press Publishing Co.*, 36 Misc. Rep. 388, 73 N. Y. Supp. 706, distinguishing *Kennedy v. Press Publishing Co.*, 41 Hun, 422, and *Bosi v. N. Y. Herald Co.*, 33 Misc. Rep. 622, 68 N. Y. Supp. 898, affirmed 58 App. Div. 619, 68 N. Y. Supp. 1134, upon the ground that in the *Kennedy Case*

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the alleged libel, if any, was that the plaintiff was the proprietor of a concert hall which was the resort of improper characters, and that there was no charge against the individuals who conducted the places, nor any claim that there was anything illegal in the maintenance of the places. In the *Bosi Case* the alleged libel was that the plaintiff's restaurant was the resort of anarchists. To the point that the libel was against the person in this case, Penal Code, § 343, is cited.

In *Neil v. Fords, Howard & Hulbert*, 72 Hun, 12, 25 N. Y. Supp. 406, a judgment was affirmed where damages were sought by reason of libelous words with reference to a work published by plaintiff.

In *Stern v. Barrett Chemical Co.*, 29 Misc. Rep. 609, 61 N. Y. Supp. 221, a judgment was reversed obtained for damages sustained by plaintiff by reason of the publication by defendant of a libel concerning plaintiff in his business as a manufacturer. Case reported below, 28 Misc. Rep. 429, 58 N. Y. Supp. 1129.

Defendant falsely stated that he had a claim or mortgage against plaintiff's place of business, and that if any brewer belonging to an association of brewers sold beer to plaintiff, the defendant, under an agreement with said association, would hold that person and the society liable for said claim; whereon the society discontinued the sale of beer to plaintiff, by which he was greatly damaged. Held, that the words tended to injure the plaintiff in his business and constituted actionable slander. *Ryan v. Burger & Homer Brewing Co.*, 37 St. Rep. 287, 13 N. Y. Supp. 660, citing *Onslow v. Horn*, 3 Wils. 177, referred to in *Moore v. Francis*, 121 N. Y. 199, in the following language: "The law allows this form of action not only to protect a man's character, but to protect him in his occupation, although no fraud or dishonesty is charged and although the words were spoken without actual malice."

A complaint by a corporation which shows that the publication of false reports concerning it have caused pecuniary injury is sufficient, although it is a business and not a moneyed corporation. *Mutual Reserve Fund Life Assn. v. Spectator Co.*, 50 N. Y. Super. 460.

The printing and circulation of a circular stating among other things, in substance, that an unscrupulous grocer was selling an inferior article with a view to deceive the public, is libelous *per se*.

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*Davey v. Davey*, 22 Misc. Rep. 668, 50 N. Y. Supp. 161, citing numerous authorities.

Slander of title to personal property as well as real estate is actionable. *Like v. McKinstry*, 4 Keyes, 397, 3 Abb. Ct. App. Dec. 62.

In *Dodge v. Colby*, 108 N. Y. 445, it was held that the allegations by defendant which were alleged to be slanderous "were false and defamatory and were made and caused to be circulated by defendant and by his agent maliciously, and with the intent to injure the said plaintiff and his title to the said lands," stated a cause of action and that the demurrer conceded the truth of the allegation.

Action for slander of title cannot be based upon a notice given by a tenant at a judicial sale of the premises, stating facts upon which he claims a continuous right of possession, where the statement in such notice is true, and there is no basis for an allegation of malice. *Cornwell v. Parke*, 52 Hun, 596, 5 N. Y. Supp. 905.

In *Marlin Fire Arms Co. v. Shields*, 171 N. Y. 384, the plaintiff sought to restrain the defendants from unjust and malicious criticisms of a manufactured article, upon the ground that the manufacturer of the article had no remedy at law because of his inability to prove special damage. It was held that this subject was not the subject of equitable cognizance, and that the future publication of such articles could not be restrained by injunction. Parker, Ch. J., in the opinion collates and comments upon the authorities in this and other jurisdictions, and arrives at the conclusion that all well-considered decisions agree in determining to be the law that a court of equity has not jurisdiction to grant the relief to secure which the action was brought.





# INDEX.

Attention is called to the analytical table of contents at the beginning of the book which it is believed will greatly facilitate reference to any desired topic. Its use is recommended as a valuable adjunct to the index, though all references contained in the table of contents also appear in the index.

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